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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Boreddi Kondamma and another .. *Appellants.**

Penal Code (XLV of 1860), sections 34, 301, 302, and 307—Charge of murder—Procuring poison to be administered to a particular person—Another accused administering the poison to wrong person—Death of that person due to the poison—Offence made out.

Two accused were charged under section 302 read with section 34 of the Indian Penal Code for the murder of *A*, by the second accused procuring oleander seeds and giving them to the first accused so that the latter might administer the poison to *B* in order to kill her in furtherance of a common intention. It was found that the first accused crushed an oleander seed and mixed it and arsenic in butter-milk and gave the butter-milk to *B* but the butter-milk was drunk by *A* and he died as a result thereof. They were found not guilty under section 302 but guilty under section 307. On appeal by the accused,

Held, on the findings arrived at, the case clearly fell within the provision of section 301, Indian Penal Code. As there was no appeal against the acquittal of the accused, it was not necessary to interfere. So far as section 307 is concerned, there was no such charge which the accused were called upon to meet. The case would have to go back for retrial and a proper charge under section 307 read with section 34, Indian Penal Code, would have to be framed for the attempt to murder *B*.

Appeals against the order of the Court of Session of the Cuddapah Division in case No. 47 of the Calendar for 1946 on 27th January, 1947.

Appellants not represented.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—These two appeals arise out of S.C. No. 47 of 1946 in the Court of Session, Cuddapah. C.A. No. 108 of 1947 is at the instance of the first accused, and C.A. No. 109 of 1947 at the instance of the second accused. Both are from jail. Both the accused were charged for the murder of one Vuttanna, by the second accused procuring oleander seeds and giving them to the first accused so that the latter might administer the poison to one Venkatamma in order to kill her in furtherance of a common intention.

The first accused crushed an oleander seed and mixed it and arsenic in butter-milk and gave the butter-milk to Venkatamma but the said butter-milk was drunk by Venkatamma's relative Vuttanna and he died as a result thereof. Both the accused wer charged for an offence punishable under section 302 read with section 34, Indian Penal Code.

The learned Sessions Judge found on the evidence that it was clear that the second accused wanted to kill Venkatamma (P.W. 1) by poisoning her and that the first accused co-operated with her in carrying out that intention and that

* Cr. Appeals Nos. 108 and 109 of 1947. 28th July, 1947.

in furtherance of this commom intention a deliberate attempt was made to administer to P.W. 1 the oleander poison sufficient to cause her death. He also found that there was no room for doubting that the death of Vuttanna was due to the poison administered by the accused in butter-milk. On these findings the learned Judge found both the accused not guilty under section 302 but found them guilty under section 307 read with section 34, Indian Penal Code and sentenced them to rigorous imprisonment for ten years.

It is difficult to follow the decision of the learned Judge. Taking first the offence with which the accused were charged, one under section 302 read with section 34, Indian Penal Code, on the findings arrived at by him the case clearly fell within the provision of section 301, Indian Penal Code. As however there is no appeal against the acquittal of the accused before me, I do not desire to interfere with the order of acquittal passed by the learned Sessions Judge.

So far as the conviction under section 307 is concerned, obviously the learned Judge was referring to the attempt of the accused to murder P.W. 1. If that were so, it must be pointed out that there was no such charge which the accused were called upon to meet. The case will have to go back and the learned Sessions Judge is directed to frame a proper charge under section 307 read with section 34, Indian Penal Code, for the attempt to murder P.W. 1.

V.S. *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

K. Shyamalambal Ammal .. *Appellant**

v.

M. S. Ramamurthi .. *Respondent.*

Receiver—Prosecution—Leave—Necessity—Offence in relation to property in his possession—Leave of Court unnecessary for prosecution.

Nowhere in the Code of Criminal Procedure is there any reference to leave of Court being required before prosecuting a receiver. A receiver is not referred to in section 195 of that Code which requires fulfilment of its provisions in respect of prosecution of certain individuals. When a receiver commits an offence in relation to property in his possession, then he can be prosecuted without leave being obtained from the Court by which he is appointed.

In re *Raja Venabasava Chikka Royal*, (1944) 1 M.L.J. 121, followed.

On appeal against the judgment and order of Kunhi Raman, J., dated 28th February, 1947 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 416 of 1946 in C.S. No. 516 of 1925.

S. Srinivasaraghavan for Appellant.

A. Sundaresan for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from the dismissal by Kunhi Raman, J., of an application made to him by the appellant seeking that the Court should direct the filing of a complaint against the respondent or, in the alternative, sanction the appellant prosecuting the respondent.

The respondent was the receiver appointed by the Court of some villages in the moffussil which were the subject-matter of proceedings to which the appellant was a party. The order appointing him receiver was made on 8th August, 1941, whereupon he took possession of two villages, and was responsible for the receipts and expenditure in respect of them. By order of Court made on 24th April,

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* O. S. A. No. 32 of 1947. 24th September, 1947.

1945, the receiver was directed to deliver possession of the villages to the appellant and, in substance, the receiver-respondent complied with that order, and he was discharged subject to filing and passing his accounts.

Thereafter, the appellant, upon examination of accounts, was dissatisfied with regard to them, and she issued applications against the respondent for the purpose of being allowed to surcharge and falsify the accounts and for delivery of account books which the receiver had maintained during his receivership. At the same time, the application out of which this appeal arises was also filed. That application was made by reason of information received by the appellant that the respondent, during his receivership had felled a number of trees in the two villages, the value of them being stated to be a sum exceeding Rs. 5,000, he had used the timber for his own purpose, and had not accounted to the estate in respect of their value. Supporting the application, there are affidavits from village officers, such as the manigar, karnam, village munsiff and so on, containing statements regarding the respondent's conduct. The application was directed to be dealt with by way of oral evidence, since the receiver denied all the allegations charged against him in the several affidavits filed in support of the petition.

The learned Judge, with regard to the application for leave to surcharge and falsify and for production of books of account, relegated the appellant to a suit. In regard to the third application, the one with respect to which this appeal is concerned, the learned Judge by his order dismissed the application, after making reference to the appellant having been relegated to a regular suit in respect of her complaints against the receiver and that that suit had been already instituted. In dismissing this application on 28th February, 1947, the learned Judge observed that the appellant was at liberty to apply again for the same relief, if so advised, after evidence in the suit had been recorded.

Mr. Srinivasaraghavan, at the outset of his argument, stated that the application before Kunhi Raman, J., was made, and this appeal has been preferred, in order that hereafter, in the event of a prosecution, the appellant would not be faced with difficulties by a dismissal on the ground that leave was necessary, when leave had not been obtained. He added further that if there was a finding that leave to prosecute the receiver is unnecessary, his client would be quite satisfied, as indeed she would have been, had that been so found when the application itself was before the learned Judge.

A number of authorities have been cited regarding the question of leave being obtained to prosecute a receiver appointed by the Court. Several of them are decisions of the Calcutta High Court. They are, *Anant Nath Dey* v. *Mohendranath Srimoni* [1], *Nagendranath Srimoni* v. *Jogendranath Srimoni* [2], *Santok Chand* v. *Emperor* [3] and *Jnanendranath Pramanik* v. *Nilmony De* [4]. The substance of those decisions amounts to this : For infringement of the ordinary criminal laws of this country, leave is not necessary for prosecuting a receiver. When it is alleged that a receiver has committed an offence by virtue of carrying out and observing orders of Court, for instance, taking possession of some property, then the Court should be informed of the intention to prosecute, as a matter of courtesy and respect to the Court, although, it has been observed that, leave in such circumstances is required. Again, if an offence is alleged in respect of property in the possession of a receiver and it is an offence for which the person in possession is liable, as for instance, some infringement of building lands or nature of the structure of immoveable property, the same view is expressed in regard to the prosecution of the receiver. In *Kimchand* v. *Devkaran Mulji* [5], the Bombay High Court held that sanction of that Court is not necessary to prosecute a receiver appointed by the High Court for an offence committed by him in exercise of his authority as receiver, the finding being that when a receiver commits an offence with respect to the property in his possession, leave is unnecessary before a prosecution is launched. Most of the authorities

1. (1912) 15 I.C. 489.
3. (1912) 15 I.C. 491.
(1918) I.L.R. 46 Cal. 432.
4. I.L.R. (1939) 1 Cal. 587.
5. (1928) I.L.R. 52 Bom. 898.

to which reference has been made were considered by Kuppuswami Aiyar, J., of this Court in In re *Raja Veerabasava Chikka Royal*[1]. The learned Judge expressed the view that in the case before him no sanction was necessary to prosecute the receiver. Respectfully, I agree with all the observations of that learned Judge.

Nowhere in the Code of Criminal Procedure is there any reference to leave of a Court being required before prosecuting a receiver. A receiver is not referred to in section 195 of that Code which requires fulfilment of its provisions in respect of prosecution of certain individuals. In the absence of any authority, I would have ventured to come to the conclusion, which I am expressing here, that when a receiver commits an offence in relation to property in his possession, then he can be prosecuted without leave being obtained from the Court by which he is appointed.

In light of this conclusion, it follows that this appeal must be dismissed. But since the appellant was anxious only to be safeguarded with regard to the prosecution of the respondent, and had the application before the learned Judge been fully considered and a finding expressed that leave was unnecessary, she would not have been required to come here. In all the circumstances, I feel that the proper order is to direct that there be no costs payable by one party to the other.

Rajamannar, J.—I agree.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SATYANARAYANA RAO.

Sripada Venkata Jagannadharao and others .. *Appellants**

v.

Kannepalli Venkatachalamayya Sastry and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11—Res judicata—*Decision between co-defendants—Decision in suit on mortgage where subsequent mortgagee has also been impleaded as defendant—Subsequent mortgage found to be binding on mortgagor's sons and the amount due on it also determined—Decree under Order* 34, *rule* 4 (4) *also drawn up—Subsequent suit by the subsequent mortgagee for the sale of the hypotheca—Decision in prior suit if operates as* res judicata.

In a suit on a mortgage, the mortgagor and his sons as also a subsequent mortgagee were impleaded as parties. The subsequent mortgagee impugned the validity of the prior mortgage. There was an issue as to the validity and binding nature of the subsequent mortgage. It was found that the mortgage was supported by consideration and that it was binding on the mortgagor's sons. The amount due was also determined and in accordance with that finding a decree was drawn up in the manner required by Order 34, rule 4 (4) of the Civil Procedure Code. In a suit by the subsequent mortgagee for the sale of the hypotheca, on a question whether the decision in the prior suit between the co-defendants operates as *res judicata* in the present litigation,

Held, it is clearly the object of the Legislature in sub-rule (4) of rule 4 of Order 34, Civil Procedure Code, that not only the rights of the prior mortgagee, but also those of the subsequent mortgagees should be worked out in order to finally determine the claims on the property which is the subject-matter of the suit. The determination of the amount due to the subsequent mortgagee " was necessary in order to give the plaintiff the relief which he claimed." It was equally necessary in view of the provisions of Order 34, rules 1 to 4 to determine also the question whether mortgage was binding on the sons of the mortgagor. The fact that the sons remained *ex parte* in the former suit cannot affect the question of *res judicata*.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole, dated 30th November, 1944, in O.S. No. 28 of 1941.

D. Narasaraju for Appellants.

Y. Suryanarayana for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal against the decree of the Subordinate Judge of Chicacole for sale of the hypotheca of the family of the appellants and their father, the first-defendant.

1. (1944) 1 M.L.J. 121.

* Appeal No. 389 of 1945. 5th September, 1947.

The suit mortgage deed, Ex. P-1, was executed on 16th June, 1928, by the first defendant alone. Prior to that, by Ex. D-1, on 23rd August, 1922, the hypotheca was mortgaged in favour of one Vedula Jagannatham Bhukte. On his mortgage he filed O. S. No. 34 of 1934 for sale of the hypotheca. He impleaded not only the first defendant but also his sons, defendants 2 to 5, who also executed the mortgage through their father as guardian. In any case, they had to be impleaded under Order 34, rule 1 as persons having interest in the secured properties. The present plaintiff was also impleaded, as required by Order 34, rule 1 as a subsequent mortgagee. He filed a written statement alleging that the mortgage in that suit was not true and that his mortgage was executed for purposes binding on the present defendants 2 to 5, who were also defendants 2 to 5 in that suit. The first defendant was *ex parte* throughout. Defendants 2 to 5 filed written statements and thereafter remained *ex parte*. In that suit an issue was framed—as one had to be framed—

"Whether the mortgage bond in favour of the sixth defendant, dated 16th June, 1928, is true and binding on defendants 1 to 5 and what is the amount due under the same ?"

The learned Judge considered the evidence adduced on that issue by the sixth defendant and found that the amount due under Exhibit I in favour of the sixth defendant was the principal amount of Rs. 30,000 and interest at the bond rate from its date till the date of payment fixed in the decree. The learned Judge held :

"It is obvious that Ex. I is supported by consideration as recited therein, and all the amounts were borrowed for valid necessities and therefore binding on defendants 1 to 5."

In accordance with this finding a decree was drawn up in the manner required by Order 34, rule 4 (4) and in the words found in form No. 9 (Appendix D). The clause of the decree with which we are concerned is :

"That if defendant No. 6 pays into Court to the credit of this suit the amount adjudged due to the plaintiff but defendants 1 to 5 and 7 to 9 make a default in the payment of the said amount, defendant No. 6 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (in the same manner as the plaintiff might have done under clause 4 above)."

A provision had also been made earlier in the decree for payment of any balance, after the dues of the plaintiff in that suit had been met, to the sixth defendant or other persons entitled to receive the same.

It is thus seen that this decree, which is in accordance with the mandatory terms of Order 34, rule 4 (4), provides for the payment to the sixth defendant, after the plaintiff had been paid his dues, of any amount remaining over and above the amount found due to the plaintiff and for execution of that decree by the sixth defendant against defendants 1 to 5 for the amount found due to him, as well as for the amounts paid by him to the plaintiff in the same manner as if he had been the plaintiff himself. The passing of the final decree in that suit was delayed till 1943, largely on account of the pendency of applications to scale down the decree. If the present plaintiff had waited until then to secure his rights against the defendants 1 to 5, his right to bring a suit against defendants 1 to 5 would have lapsed ; because the mortgage debt became payable on 16th June, 1929. The question that arises in this appeal is whether the decisions between the present plaintiff and the defendants 1 to 5 in O.S. No. 34 of 1934 operate as *res judicata* in the present litigation.

It is not denied by the learned advocate for defendants 1 to 5 that the question of the amount due under the mortgage bond and its binding nature were in conflict between the sixth defendant on the one hand and defendants 1 to 5 on the other : but it is argued that it was not necessary to determine the conflict between the defendants in order to give the plaintiff in that suit the remedy to which he was entitled, and that therefore the conditions laid down by their Lordships of the Privy Council in *Munni Bibi* v. *Tirloki Nath*[1], for the operation of *res judicata* between

1. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).

co-defendants are not satisfied. It is said that the only right that the sixth defendant had in the former suit—if his claims was true—was a right to redeem the plaint mortgage, and that therefore all that it was necessary to determine in O.S. No. 34 of 1934 was whether the present plaintiff had such a right, *i.e.*, whether any mortgage amount, however small, was due to the present plaintiff. It was not necessary from the plaintiff's point of view, it is argued, to ascertain the actual amount due under the mortgage and to decide the question whether the mortgage was binding on defendants 2 to 5. That is true ; but the argument overlooks the mandatory provisions of Order 34, rule 4 (4). That sub-rule says that where, in a suit for sale—subsequent mortgagees—are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in form 9—of Appendix D. It is clearly the object of the Legislature in this sub-rule that not only the rights of the prior mortgagee, but also those of the subsequent mortgagees, should be worked out, in order to finally determine the claims on the property which is the subject of the suit. As already pointed out, it provides an additional right on the part of the subsequent mortgagee to execute the decree as the plaintiff himself could, provided that he pays off and redeems the mortgage of the plaintiff. No decree could therefore be passed in favour of the plaintiff alone without also determining the amount due to the subsequent mortgagees. In the words of the Privy Council in *Muni Bibi* v. *Tirloki Nath*[1], the determination of the amount due to the sixth defendant "was necessary in order to give the plaintiff the reliefs which he claimed."

It is further argued that even though Order 34, rule 4 (4) may require that the amount should be determined, it was not necessary, in order that the plaintiff should get a decree for the relief which he claimed, to determine whether the subsequent mortgage was binding on the junior members of the family. We are however satisfied that Order 34, rules 1 to 4 require that the interests and rights of all parties to the mortgage suit should be completely determined. Even if the sixth defendant redeemed the plaintiff's mortgage, he could not proceed against the hypotheca if the mortgage was binding only on the father ; for only his share of the hypotheca could then be brought to sale. If, after sale by the plaintiff, a certain amount remained, the subsequent mortgagee would only be permitted to take the mortgagor's share of what remained and not the whole of it ; whereas if the mortgage were binding on the junior members of the family, he would be entitled to the whole of the remainder. It was because the learned Judge realised that it was necessary to determine this question that he raised the issue set out above and decided it. It is true that defendants 2 to 5 remained *ex parte* and failed to appear and let in evidence on this issue ; but the question of *res judicata* cannot be effected by this circumstance. In view of our finding given above it is unnecessary to reconsider in this appeal whether the items of considerations shown in the mortgage-deed were binding on the junior members of the family.

The appeal is dismissed with the costs of the first respondent.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SATYANARAYANA RAO.

Manuaru Veeraswami .. *Appellant**

v.

The Provincial Government of Madras, represented by the Secretary to the Government, Development Department and another .. *Respondents.*

Government servant—Enquiry into conduct—No right to be represented by counsel—Necessity of notice of punishment which it is proposed to be imposed—Government of India Act (1935), *section* 240 (3)—*Requirements.*

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1. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).

* Appeal No. 251 of 1945. 24th September, 1947.

In the absence of a statutory right such as is indicated in section 240 of the Government of India Act a Government servant would have no right, if the Government wished to dispense with his services, other than reasonable notice. Such further rights as are created must be gathered only from a reading of the statute or rules and he cannot have any right apart from those rules.

A public servant whose conduct is inquired into has no common law or statutory right to appear by counsel. He cannot appear by pleader without permission of the enquiring officer. Under section 240 (3), Government of India Act, the attention of the Government servant concerned must be prominently drawn to the punishment which might be meted out to him at the time when such proposed action is about to be taken, if the proposed action is dismissal or reduction in rank.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, dated 15th November, 1944, in O.S. No. 70 of 1944.

N. Rajagopala Aiyangar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal against the decree of the Subordinate Judge of Nellore, dismissing the suit filed by the appellant, a peon in the Forest Department, for a declaration that his dismissal from service by the District Forest Officer was wrongful; for a direction to the Government to reinstate him in office, or in the alternative for Rs. 6,000 as damages. The suit was brought against the Government and also against the District Forest Officer, because it was alleged that the District Forest Officer had acted with malice. The learned Subordinate Judge found that the dismissal was not wrongful; and so he dismissed the suit with costs.

Four main objections have been raised to the decree of the lower Court. One is that fundamental principles of justice were violated in withholding from the appellant certain papers which had a bearing on the case and the absence of which hampered him in his defence. The second was that he was not allowed to appear by a vakil, the third was that he was not permitted to examine the District Forest Officer and his servants as his witnesses; and the last was that the provisions of section 240 (3) of the Government of India Act had not been complied with the consequence that the dismissal was illegal.

We have seen the various documents referred to in connection with the first ground; and we agree with the learned Subordinate Judge that no material papers were withheld from the appellant. In fact, this point has not seriously been pressed.

On the question whether the appellant was entitled to be represented by a vakil, there is an authority of a Bench of this Court in *Rajagopala Iyengar* v. *Collector of Salt Revenue, Madras*[1], that no such right exists. Two principal reasons were given by the learned Judges for the decision. One was that rule 55 of the Civil Service (Classification, Control and Appeal) Rules, gave a right to be heard in person, which expression seemed to preclude a right of appearing through a pleader. The other reason was that there was no common law right of that nature and that the rules did not suggest that any such right existed. The learned Chief Justice said :

" Mr. Jayarama Aiyar has conceded that there is no right at common law to appear by an agent and the Advocate-General argues that there is no such general right and that the scheme of the Indian Legislature is to confer only a special right to be represented by an advocate or agent such as that given by section 340 of the Criminal Procedure Code. Such a statutory right is also given under Order 3, rule 1, Civil Procedure Code."

It is argued that the attention of the learned Judges was not drawn to English cases in which it was held that there is such a common law right. Three cases have been cited here : *Jackson & Co.* v. *Napper* : In re *Schmidt's Trade Mark*[2], *Reg* v. *Assessment Committee of St. Mary Abots Kensington*[3] and *Norey* v. *Keep*[4]. In the first case it was held that an agent could appear for an appellant to register a trade mark. In the second case it was held that a person assessed to a poor rate tax had a right to appear before the Tribunal to argue with regard to the quantum of his tax through a surveyor. The last case upheld the claim to a right to inspect Trade

1. (1937) 2 M.L.J. 189.
2. (1886) 35 Ch. 162.
3. 64 L.T. 240.
4. (1909) 1 Ch. 561.

Union accounts by an accountant on behalf of the members. Reference was made in all these cases to the general right of a person to appear by an agent in all matters. In a case like the present, however, we cannot see how any common law right can exist. In the absence of a statutory right such as is indicated in section 240 of the Government of India Act, the appellant would have no right, if the Government wished to dispense with his services, other than reasonable notice. Such further rights as he might have were created by the Government of India Act of 1935, and by the various statutes and rules in existence prior to that Act. If the rights of a Government servant are created by statute or by rule, the extent of his rights must be gathered only from a reading of those statutes or rules ; and he cannot have any right apart from those rules or statutes.

There is very little direct authority on this point, because it has always been the practice that a public servant does not appear by pleader without permission of the enquiring officer ; and it has always been presumed that he had no such right. The question was however raised before the Federal Court in *Quadritullah* v. *North West Frontier Province*[1], where a dismissed Sub-Inspector contended that he had not been given an opportunity of being heard through counsel. It seems not to have been argued in that case that he had a common law right to be heard, but that the refusal to allow him to appear through pleader had resulted in his not having a reasonable opportunity of showing cause against his proposed dismissal. The learned Chief Justice said :

> " The appellant's complaint was that the preliminary enquiry by the Inspector was held in his absence and that at the subsequent open enquiry before the Superintendent the file prepared by the Inspector was used and he was not permitted to be represented by counsel. Both the Courts below went in detail into the evidence of these matters and were satisfied that the appellant was given a reasonable opportunity of showing cause against his proposed dismissal. Having listened with care to all that was addressed to us by appellant's counsel, we too are convinced that on this point also the Courts below came to a right conclusion."

If the rules or the common law gave a right to a public servant to be represented by counsel, then the refusal of the enquiring officer to permit him to be represented by counsel would mean that he was not given a reasonable opportunity of showing cause. We have no doubt that the learned Judges of the Federal Court were of opinion that he had no such right as is claimed by the appellant in this appeal.

The District Forest Officer, in a long statement prepared to explain to the accused the nature of the charges against him, said that he had told his servants that he intended following a strictly vegetarian diet while in camp and that no meat was to be prepared for him. He mentioned this because the appellant was charged with having taken a fowl from the son of a forest guard without paying for it and had explained at one stage that he had bought it for the District Forest Officer. The peon wished to examine the District Forest Officer and the servants of the District Forest Officer in order to show that he had not been told anything about his instruction not to be provided with meat. This reference to the instructions given by the District Forest Officer to his cook was however quite irrelevant, as he did not assert that the appellant had knowledge of the instructions given by him to his cook ; and this irrelevancy was the reason why the Forest Officer refused permission to examine his servants and the conservator refused to allow the Forest Officer to be examined. These orders seem to have been correct and certainly did not lead to any miscarriage of justice for they confined the enquiry to the really relevant issues.

The appellant was charged twice with the offences for which he was subsequently dismissed. As a result of the first enquiry the appellant was sentenced by the District Forest Officer to suspension for six months. In appeal to the Conservator of Forests, the punishment was enhanced to dismissal, on the ground that such offences were very common amongst menials and very difficult to detect and that therefore when a menial was caught, it was necessary to impose a severe sentence. The matter was then taken in further appeal to the Chief Conservator

1. (1944) 1 M.L.J. 500 : 1944 F.L.J. 160 (F.C.).

of Forests who found, upon a scrutiny of the procedure adopted, that there had been an irregularity in that the witnesses who made statements at a preliminary enquiry were not called upon to repeat those statements before cross-examination began. It was ordered by the Chief Conservator of Forest that these statements should now be read over to the appellant and a fresh opportunity given for cross-examination. It would have been permissible, upon the order of the Chief Conservator of Forests, for the District Forest Officer to have continued the trial on the same charge from the stage at which the irregularity had been committed. He did not however do that, but drew up a fresh charge. On the first occasion two charges were framed : (1) Taking advantage of his official position and demanding and accepting gratification from subordinates and their relations ; and (2) making false statements to the District Forest Officer. Then followed a summary of the evidence in support of these charges. Then, in a fresh paragraph, the appellant was directed to show cause why he should not be dismissed from service for misconducting himself. Unfortunately, this direction was not repeated in the second charge sheet and that omission has given room for the argument that the provisions of section 240 (3) of the Government of India Act were not complied with.

Section 240 (3) of the Act says that

> " no such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

The learned advocate for the appellant has placed a great deal of reliance on the judgment of the learned Chief Justice and Zafrullah Khan, J., in *Secretary of State for India* v. *I. M. Lall*[1]. The learned Chief Justice at page 138 remarked :

> " In our judgment, the words ' against the action proposed to be taken in regard to him ' require that there should be a definite proposal by some authority either to dismiss a civil servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and when final action may be determined upon . . . . . . All that it expressly requires is that where it is proposed to dismiss or reduce in rank a civil servant he should be given reasonable opportunity of showing cause against the proposal to dismiss or reduce him. . . . . . . It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken."

The learned Judges make it clear that they considered that the proper time at which the officer whose conduct is being enquired into should be called upon to show cause is after the evidence has been taken and the authority proposes to take such action as is referred to in the sub-section. The learned Government Pleader however refers to certain passages of this same judgment in which it is suggested that this rule need not be construed too strictly. For example, immediately after the passage above cited, the learned Chief Justice remarked :

> " It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges, are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or in adequately summarised form, the results of that enquiry, and the findings of the enquiring officers and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank."

It is true that in this case because of the simplicity of the charges and of the evidence, the result would clearly have been the same, even if the rules had been complied with ; but the above passages from the judgment of the learned Chief Justice of the

1. (1945) 2 M.L.J. 270 : (1945) F.C.R. 103 : (1945) F.L.J. 129.

Federal Court make it clear that if the procedure is not followed, dismissal is improper. It is argued by the learned Government Pleader that since each case has to be considered on its own merits, an examination of the procedure adopted will show that a reasonable opportunity was given to the appellant to show cause why he should not be dismissed. In view of the simplicity of the case, we think that if the appellant had been dismissed as a result of the first enquiry he would have had no cause to complain ; but the appellant was tried a second time, *de novo*, and a fresh charge framed ; so that the presence in the first charge of a direction to show cause why he should not be dismissed and the remarks of the Conservator of Forests in appeal that he considered that dismissal was the proper punishment for such an offence cannot be said to be reasonable notice of the nature insisted upon by the learned Judges of the Federal Court. In their opinion, the attention of the Government servant concerned must be prominently drawn to the proposed action at the time when such proposed action is about to be taken. We therefore feel that in view of this decision of the Federal Court we have no option but to hold that the appellant was improperly dismissed.

The only remaining question is with regard to the damages to which he is reasonably entitled. Sub-section 3 of section 240 only applies to dismissals and to reductions in rank ; so that although we have found that since this sub-section was not complied with the appellant was improperly dismissed, yet it does not follow that he was not properly found guilty of the offences with which he was charged. The enquiry was regular and the findings of fact cannot be disputed in this Court. We cannot ignore the fact that he was properly suspended during the enquiry and was found guilty of the offence with which he was charged. It has been pointed out by the learned advocate for the appellant that the enquiry went on for a period of three years and that during that time the appellant could not have looked for any alternative employment and that he is entitled to be compensated on the basis of what he could have earned if he had been retained as a peon until he reached retiring age. We are satisfied that this is not the proper basis on which to calculate damages. He was properly kept under suspension during the enquiry and the long delay that occurred was largely due to the obstructive tactics adopted by him. He was at liberty, at any rate from the time of the final order, to look for alternative employment ; in fact, it was his duty to do so. It was only if after seeking for employment and being unable to obtain any that he would be entitled to sums of the nature claimed by him in his plaint and in his appeal. We think that looking into this question from every aspect, the appellant would be reasonably compensated by a payment of two years' pay, which would amount to Rs. 432, his pay being, according to his statement, Rs. 18 a month.

There remains the question of costs. In the trial Court the appellant did not raise the only point upon which he has succeeded in this Court ; and so he cannot well complain of the learned Judge's dismissal of the suit. Even in this Court he has failed on every issue except one ; and expenses have been incurred on account of the other issues and considerable time has been spent in arguing them. We therefore feel that the just order would be that in the trial Court both parties should bear their own costs and that in this Court the first respondent should bear his own costs and half the costs of the appellant. As regards the second respondent, the District Forest Officer, the appeal has to be dismissed. As the Government Pleader is appearing for him also, there need be no order as to costs with regard to this respondent. The plaintiff must pay the court-fee due to Government in the lower Court.

The Order of the Court was made by

Horwill, J.—The learned Government Pleader has applied for a certificate under section 205 for leave to appeal to the Federal Court.

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1. (1945) 2 M.L.J. 270 : (1945) F.C.R. 103 : (1945) F.L.J. 129.

It is true, as stated by the learned Government Pleader, that there is little or no dispute with regard to the actual facts. The question that we have to decide is whether, within the meaning of section 240 (3) of the Government of India Act, the appellant was given reasonable opportunity of showing cause against the action proposed to be taken against him. After an examination of the facts and a reference to a similar case dealt with by the learned Judges of the Federal Court in *The Secretary of State for India* v. *I. M. Lall*[1], we came to the conclusion that the appellant had not been given a reasonable opportunity of showing cause. That is a question of fact or, at best, a question of law arising out of the interpretation of facts. Certainly on question arises as to the interpretation of the Act. Section 240 (3) is clear that a reasonable opportunity had to be given to the appellant.

In *The Governor-General in Council* v. *T. M. Krishnaswami Pillai*[2], this Court gave a certificate in a somewhat similar case; and on the strength of that certificate an appeal was filed in the Federal Court. The learned Judges pointed out that a certificate should not have been granted by this Court as the question raised was one of fact.

The application is dismissed.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE TYAGARAJAN.

The Catholic Mission Presentation Convent by Mother Superior, Coimbatore, and another .. *Appellants**

v.

Subbanna Goundan and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 41—Scope—Protection of transferee under—Conditions necessary for—Question whether transferee took reasonable care to ascertain that transferor had power to transfer—Onus—Question not one of pure fact—Review in second appeal.

In order to successfully invoke the protection of section 41 of the Transfer of Property Act, the transferee must establish that (1) the transferor was the ostensible owner of the properties, (2) with the consent express or implied of the real owner, (3) that the transferee paid consideration, and (4) acted in good faith, (5) after taking reasonable care to ascertain that the transferor had power to transfer. The consent of real owner referred to in the section must be to the transferor holding the property as ostensible owner and not also to the transfer sought to be protected under the section. The expression "with the consent, express or implied" must import in the context of the section, that the real owner is in some manner privy to the creation of the ostensible ownership. Where a reversioner within 12 years of the death of the last male holder's widow files a suit for recovery of the property, section 41 of the Transfer of Property Act will not afford protection to a transferee from a squatter settled on the property in the meantime who purported to sell it.

Whether a transferee from an ostensible owner took reasonable care to ascertain that the transferor had power to make the transfer has to be determined with reference to the circumstances of the particular case, the test being whether he acted like a reasonable man of business and with ordinary prudence. But the question whether that test has or has not been properly applied in any particular case cannot be regarded as one of pure fact not open to review in a second appeal.

The transferee must first show that he purchased the property from the apparent owner for consideration believing in good faith, after taking reasonable care, that the apparent owner was the real owner. It is only then that the onus is laid on the real owner to show that there were circumstances which ought to have put the transferee upon further inquiry.

Whether any and what inquiry should be made to ascertain that the ostensible owner was the true owner in any particular case depends on the circumstances of that case.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 235 of 1945 preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O.S. No. 25 of 1943.

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1. (1945) 2 M.L.J. 270 : (1945) F.C.R. 103 : (1945) F.L.J. 129.
2. (1946) 1 M.L.J. 267 : (1946) F.L.J. 16.

* S. A. No. 1584 of 1946. 2nd September, 1947.

The Advocate-General (*K. Rajah Aiyar*) and *M. Krishna Bharathi* for Appellants.

T. V. Muthukrishna Aiyar, S. Sitarama Aiyar and *S. Rajaraman* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is a second appeal preferred by defendants 6 and 7 from a decree of the District Judge of Coimbatore affirming the decree of the Subordinate Judge of the same place whereby the title of the respondents 1 to 4 to certain immoveable properties was declared, and the appellants were directed to deliver possession of them to the said respondents with mesne profits.

One Nanjappa Goundan was the original owner of the properties, and on his death many years ago his widow Palaniammal inherited the properties and was in enjoyment thereof till the 10th January, 1931, when she died. Thereupon disputes arose regarding succession to the properties of Nanjappa between the fifth respondent, who was the first defendant in the suit who claimed title to be the nearest *sapinda* and reversioner of Nanjappa on the one hand and defendants 8 and 9 who are the grandsons of Palaniammal's sister and set up title as devisees under her will on the other. The first respondent's father, Palani Goundan, who, it has been found below, and the finding has not been questioned before us, was Nanjappa's step-sister's son and as such his true reversionary heir under the Hindu Law of Inheritance (Amendment) Act (II of 1929) as interpreted by the Privy Council (vide *Mst. Sahodra* v. *Ram Babu*[1]) did not put forward any claim of succession to Nanjappa when his widow died in 1931. On the other hand, according to the defendants, he took an active part as one of the arbitrators in effecting a settlement of the disputes between the first defendant and defendants 8 and 9. Though Palani Goundan's participation in the settlement has been found against, the disputes between the other claimants appear to have been settled by the defendants 8 and 9 acknowledging the validity of the first defendant's claim to Nanjappa's properties and the first defendant delivering to them, in consideration of such acknowledgment, some of those properties. In pursuance of that settlement the first defendant made statements on the 26th January, 1931, before the Revenue Inspector of Vaniputhur consenting to patta being transferred in the name of defendants 8 and 9 in respect of the lands given to them as aforesaid.

Thereafter the first defendant continued in undisturbed possession and enjoyment of the remaining properties of Nanjappa till he sold some of them to the first appellant (6th defendant) for Rs. 11,000 on the 11th January, 1940, and some others to the second appellant (7th defendant) for Rs. 33,000 on the 21st May, 1942, under sale deeds marked as Exs. D-5 and D-6 respectively. During all these years, neither Palani Goundan till he died in 1934, nor his sons, the first respondent and the deceased father of respondents 2 to 4, set up any rival claim to Nanjappa's properties in the hands of the first defendant or of defendants 8 and 9 until they brought the present suit on the 11th January, 1943, the last day of limitation prescribed for the suit, for a declaration of their title to all the properties left by Nanjappa and for recovery of such of those properties as were respectively in the possession of the first defendant and his alienees including the appellants.

Various pleas were raised in answer to the suit including a plea of estoppel based on the part alleged to have been played by Palani Goundan in bringing about the settlement of 1931 and his subsequent acquiescence in the enjoyment of the properties by the first defendant as the ostensible owner. All the pleas were overruled by the Courts below which upheld the plaintiff's right to the properties claimed, and the suit was accordingly decreed so far as the appellants were concerned, the other defendants having entered into a compromise with the plaintiffs. The only question raised in this appeal is whether the appellants are entitled, as *bona fide* transferees for value from an ostensible owner, to seek the protection of section 41 of the Transfer of Property Act.

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1. (1943) 1 M.L.J. 180 : L.R. 69 I.A. 145 : I.L.R. (1943) Kar. 12 (P.C.).

That section reads thus :

"Where with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it ; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

It is manifest that, in order to invoke successfully the protection of the section, the transferee must establish that (1) the transferor was the ostensible owner of the properties, (2) with the consent express or implied of the real owner and (3) that the transferee paid consideration, and (4) acted in good faith, (5) after taking reasonable care to ascertain that the transferor had power to transfer. The Courts below have held that the appellants are not entitled to the protection of the section as they failed to satisfy conditions (2) and (5) though they have established the other conditions. The lower appellate Court appears, however, to have proceeded on the assumption that the "consent express or implied" of the real owner was necessary not only to the transferor holding the property as ostensible owner but also to the transfer sought to be protected under the section. Though, as a matter of grammatical construction, the collocation of the words makes such interpretation possible, it is now generally accepted as the better view that those words have reference only to the transferor holding the property as ostensible owner. This is because, as pointed out in *Fazl Hussain* v. *Muhammad Khazim*[1], the consent of the true owner to the transfer would by itself estop him under section 115 of the Evidence Act, and the other requirement of section 41 as to the transferee taking reasonable care to ascertain that the transferor had power to make the transfer will be rendered nugatory. See also *Satyanarayanamurthi* v. *Pydayya*[2] and *Fakruddin Sahib* v. *Ramayya Setti*[3]. The learned Judge's error is, however, of no consequence, as he has found that it was not satisfactorily proved that Palaniappa took any part in the 1931 settlement the only conduct relied on as showing his consent, apart from inaction and silence. The questions that arise for consideration are, accordinly, first, whether Palani Goundan or his sons, the plaintiffs, consented expressly or impliedly to the first defendant holding the property as the ostensible owner, and, secondly, whether the appellants took reasonable care to ascertain that the first defendant had the power of transfer.

On the first question, apart from the alleged arbitration by Palani Goundan in the settlement of 1931 which, as already stated, has been found against, no express consent by him till his death in 1934, or thereafter by the plaintiffs, to the first defendant's enjoyment of the property as the heir and successor of Nanjappa was suggested. The question therefore reduces itself to whether mere non-assertion of their claim as the rightful owners of the property after Nanjappa's death could be taken to imply their consent to the first defendant, who is no more than a trespasser in the eye of the law, taking possession of the property and holding the same as the ostensible owner. Both the lower Courts have laid stress in this connection on the doubtful state of the law as to a step-sister's son's right of succession under the Hindu Law of Inheritance (Amendment) Act (II of 1929), until the matter was cleared up by the decisions of the Privy Council in *Mst. Sahodra* v. *Ram Babu*[4] and of a Full Bench of this Court, given more or less at the same time in *Papammal* v. *Meenammal*[5] in both of which the words "sister" and "sister's son" as used in the Act were held to include a half sister and a half sister's son respectively. Earlier, this Court had held in *Angamuthu Muthirian* v. *Sinnapennammal*[6] following the view taken by the Allahabad High Court in *Ram Adhar* v. *Sudesra*[7], that "sister" would not include a half sister, although the Nagpur High Court had expressed a different opinion (*Amrut and others* v. *Mst. Thagan*[8]). In that state of the law, Palaniappa

1. (1933) I.L.R. 56 All. 582.
2. (1943) 1 M.L.J. 219.
3. (1944) 1 M.L.J. 125.
4. (1943) 1 M.L.J. 180 : L.R. 69 I.A. 145 : I.L.R. (1943) Kar. 12 (P.C.).
5. (1943) 1 M.L.J. 1 : I.L.R. (1943) Mad. 235 (F.B.).
6. (1937) 47 L.W. 286.
7. (1933) I.L.R. 55 All. 725 (F.B.).
8. I.L.R. (1938) Nag. 155 (F.B.).

and the plaintiffs, could not have been sure of their true rights even if they had taken legal advice. But probably they took no steps to assert them because they were not aware of the change effected by the statute in the Hindu Law of Inheritance. However that may be, if they did nothing by way of holding out the first defendant as the owner, can it be said that, by their mere inaction and silence, they impliedly *consented* to the first defendant holding the property as "ostensible owner"? We think not. We asked the learned Advocate-General who argued the case for the appellants, how long the quiescence of the real owner should continue to give rise to an implication of consent—to the ostensible owner holding the property, and we waited in vain for an answer. The expression "with the consent, express or implied" must, we apprehend, import, in the context of the section, that the real owner is in some manner privy to the creation of the ostensible ownership. It has to be remembered in this connection that the law of limitation allows the plaintiffs a period of 12 years from the death of Nanjappa's widow for suing to recover their property, and the plaintiffs have brought their suit within the time limited. If, in the meantime a squatter settled on the property and purported to sell it, *caveat emptor*, section 41 is not intended, in our judgment, to afford protection in such cases. A similar view has been expressed in a recent decision of the Lahore High Court in *Shamsher Chand* v. *Bakshi Mehr Chand*[1].

Turning to the other ground on which the appellants have been denied the protection of section 41, *viz.*, that they made no reasonable enquiries to ascertain that the first defendant had power to transfer, Mr. Muthukrishna Aiyar for respondents 1 to 4 has urged that it is a finding of fact which is not open to review in second appeal. This view is no doubt supported by *Jamnadas* v. *Umashankar*[2] and *Bansidhar* v. *Gopilal*[3]. The former decision was however explained and distinguished by the same Court in *Mulraj* v. *Fazl Imam*[4], where it was held that the question whether section 41 applied to a given set of facts was not a question of fact. Whether a transferee from an ostensible owner took reasonable care to ascertain that the transferor had power to make the transfer has no doubt to be determined with reference to the circumstances of the particular case, the test being whether he acted like a reasonable man of business and with ordinary prudence. (*Fazal Husain* v. *Muhammad Kazim*[5].) But the question whether that test has or has not been properly applied in any particular case cannot be regarded as one of pure fact not open to review in a second appeal.

It has also been argued by Mr. Muthukrishna Aiyar that section 41 postulates two distinct lines of inquiry being made by the transferee, first, to satisfy himself that the transferor is ostensibly the owner of the property proposed to be transferred and, secondly, to ascertain that the transferor has power to make the transfer, and that, inasmuch as the appellants are found not to have made any inquiry directed to the latter purpose, they are not entitled to the protection of the section. Learned counsel insisted that, after ascertaining that the transferor is the ostensible owner, the transferee must, in every case, make some further inquiry to ascertain that the ostensible owner was also the real owner. On the other hand, the learned Advocate-General broadly contended that the transferee, after satisfying himself as to the transferor's ostensible ownership, need not make any further inquiry unless he had reason to suspect that the ostensible title was not the real title, or, in other words, unless there was something in the circumstances of the case to put him upon further inquiry, and it was for the real owner to show that there was. Reliance was placed in support of this contention on the well-known passage in *Ram Coomar's case*[6], which has been codified in a statutory form in section 41:

"It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value

1. A.I.R. 1947 Lah. 147.
2. (1914) I.L.R. 36 All. 308.
3. A.I.R. 1940 Pat. 480.
4. (1923) I.L.R. 45 All. 520.
5. (1933) I.L.R. 56 All. 582.
6. (1872) L.R. 1 I.A. Supp. Vol. 40 (43): 18 W.R. 166.

from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it."

We are unable to accept either of these extreme suggestions. The respondent's construction of the section would tend to reduce the requirement of the proviso to a hard and fast rule applicable in every case irrespective of its circumstances. Cases are readily conceivable where the apparent ownership may be so complete in all its indicia that no reasonable man of ordinary prudence would pursue the inquiry any further to ascertain that the transferor had power to make the transfer. On the other hand, the appellant's contention would, if accepted, relieve the transferee of the burden of proof which the proviso obviously casts upon him in the ordinary case. Ostensible title, where it is not the real title, must, generally speaking, be defective in some respects and the section accordingly assume the necessity for an inquiry to ascertain with reasonable care whether the apparent owner is also the real owner and places on the transferee the burden of proving that such inquiry was made. This may, at first sight, seem inconsistent with the passage quoted above which throws on the real owner the burden of showing that " there existed circumstances which ought to have put the transferee upon an enquiry that if prosecuted would have led to discovery of the real title." But there will be found to be no inconsistency if it is borne in mind that the passage states the position as it would arise when the transferee has shown that he has purchased the property " for value from the apparent owner in the belief that he is the real owner." Having regard to the fact that the principle is one of " natural equity " designed to protect a purchaser for value against the real owner in the circumstances stated, it is obviously necessary that the purchaser should act in good faith and with reasonable care in forming the ' belief ' that the apparent owner is the real owner though these conditions are not expressly stated in the passage. In other words, the transferee must first show that he purchased the property from the apparent owner for consideration believing in good faith, after taking reasonable care, that the apparent owner was the real owner. It is only then that the onus is laid on the real owner to show that there were circumstances which ought to have put the transferee upon further inquiry. There is thus no difference in regard to the incidence of the burden of proof between section 41 and the statement of the principle by their Lordships in *Ram Coomar's case*[1].

The position then is this. There is no hard and fast rule that the transferee, after satisfying himself as to the apparent ownership of the transferor, should, in every case, make some further inquiry as regards his power to make the transfer. Nor is it correct to say broadly that once the transferee proves that he has taken the transfer from an ostensible owner in good faith and for consideration, he need go no further and prove that he made inquiries in regard to the title of his transferor such as a reasonable man of ordinary prudence would make, unless the real owner is able to point to something in the circumstances of the case which should lead an ordinarily prudent person to make further inquiry about the transferor's title. Whether any and what inquiry should be made to ascertain that the ostensible owner was the true owner in any particular case depends on the circumstances of that case.

In the present case as already stated it has been found that the appellants made no inquiry about the title of the first defendant beyond what the recitals in their sale deeds disclosed. They did not go into the box to give evidence on the point. It is, however, urged on their behalf that this was sufficient to satisfy the standard of ordinary prudence in the circumstances of the case. We are unable to agree with that view. The sale deed, Ex. D-5, dated the 11th January, 1940, executed in favour of the first appellant shows nothing beyond the fact that the

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1. (1872) L.R. 1 I.A. Supp. Vol. 40 (43) : 18 W.R. 166.

first defendant had been in possession and enjoyment of the properties paying the kist due to the Government in respect thereof and that the first defendant got the properties sold thereunder as the "anantaravars (nearest reversioner) after the death of my *dayadi* Palaniammal." It does not even state that the *pattas* for the lands stood in the name of the first defendant, though it has been found that he had pattas in his name since 1931. It refers to an encumbrance certificate for three years prior to the sale having been handed over to the first appellant "as title." The other sale deed Ex. D-6, dated the 21st May, 1942, executed in favour of the second appellant, discloses a few more particulars; that the first defendant had hypothecated some of the properties in 1935, and usufructuarily mortgaged some others in 1941; and that pattas for the lands stood in his name, for he undertakes to "get the patta in my name transferred to your name." It was pointed out for the respondents 1 to 4 that it was by no means clear that the hypothecation of 1935 related to the properties which the first defendant got as reversioner, for the sale deed comprised also ancestral family properties. No evidence was directed to this point as no reliance was placed on the hypothecation in this connection. However that may be, the deed shows that the first defendant dealt with the property as the absolute owner by granting a usufructuary mortgage in 1941. This deed, like Ex. D-5, also recites that the first defendant got the properties in suit by reversion (anantaravars). These particulars regarding the properties, while they may be sufficient to establish the first defendant's ostensible ownership, could have hardly satisfied a reasonable man of ordinary prudence about the first defendant's title to the properties he was purporting to sell. No doubt there was no question here of examining the transferor's title deeds, for he got the properties by inheritance. But, as observed by the learned District Judge, it is always risky— to purchase property from a reversioner and that circumstance should have put the appellants upon inquiry as to whether the first defendant was in fact the nearest reversioner and there were not nearer reversioners to Nanjappa who died long ago. It is true that, if such inquiry had been made, it would have disclosed that according to the view then prevailing in Madras the plaintiff as the step sister's son were not the nearest reversioners of Nanjappa (*Angamuthu Muthurian* v. *Sinnapennammal*[1]). But, on the other hand, a Full Bench of the Nagpur High Court after an exhaustive examination of the subject had expressed a view favourable to the plaintiffs' right of succession to Nanjappa (*Amrut and others* v. *Mst. Thagan*[2]). As the learned District Judge remarks, if the appellants had made enquiries and ascertained this, they might have refrained from buying the properties, or it may also be that if, after making such enquiries they took the risk and purchased the properties relying on the Madras view, they would be protected under section 41. However that may be, the appellants, having failed to make inquiry as to whether the first defendant was in fact the nearest reversioner of the last male holder who died long ago are not, in our judgment, entitled to claim the protection of section 41.

The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1937) 47 L.W. 286.

2. I.L.R. (1938) Nag. 115 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Ananthanarayana Sarma and others .. *Petitioners**

v.

Krishnamurthy Ayyar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 15—Scope of the bar under—Refusal of leave to applicant to sue as pauper—Death of such applicant—Bar to a subsequent similar application, if extends to deceased applicant's legal representatives.

The right to sue *in forma pauperis* is a personal right of the individual who is given leave to sue as a pauper. As there is nothing in rule 15 of Order 33, Civil Procedure Code, or in any other part of the Code by which the bar imposed upon the unsuccessful applicant is extended to any one else, such as his legal representative, successor-in-title or others, when an application to sue *in forma pauperis* is refused, the bar affects the applicant alone and does not extend to any other person who wishes to enforce his personal right to property by way of suit. In such cases the right to sue must be distinguished from the method by which that right can be exercised. Even where the sons have inherited from their deceased father (who had been refused leave to sue as pauper) the right to the properties and, it would follow, the right to sue for them, their right to sue arises out of devolution of the property upon them ; they did not inherit from him the right to sue as paupers. The latter right can be theirs only if they can bring themselves within the definition of pauper in rule 1 of Order 33. Their right to sue for the property is one which is independent of a right, if they can establish it, to institute their suit *in forma pauperis.*

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tanjore, dated 13th December, 1944, in O. P. No. 4 of 1944.

M. S. Venkatarama Aiyar and *S. Venkatarama Aiyar* for Petitioners.

R. Viswanathan, K. P. Panchapakesa Aiyar (Court Guardian) for Respondents.

On an Order of Reference by Shahabuddin, J., dated 6th August, 1947, this petition coming on for hearing, the Court delivered the following

JUDGMENT : *The Chief Justice.*—The relevant facts in this civil revision petition can be stated shortly. On 16th March, 1911, one Sami Ayyar, died possessed of certain properties ; he left a widow who died on 20th October, 1931. Upon her death the father of the three petitioners claimed the properties ; he made an application under the provisions of Order 33, Civil Procedure Code, for leave to sue as a pauper for the purpose of recovering the properties. On 6th October, 1933, leave was refused and the application was dismissed under rule 7 of the order. The father died in September, 1934, and his rights, if any, to the properties devolved upon his three sons, the petitioners herein. On 15th October, 1943, they applied to sue *in forma pauperis* in regard to their alleged claim to the properties. That application was made in respect of the petitioners' own personal cause of action ; it was not made by them in any representative capacity respecting their father's interest in the properties. On 13th December, 1944, the learned Subordinate Judge of Tanjore dismissed their application holding that, since rule 15 of Order 33 of the Code would have prevented the father from making a further application for leave to sue as a pauper, the rule also prevented his sons, as his legal representatives, from succeeding in their application. The learned Subordinate Judge, in his judgment, relied upon the decision of a Division Bench of this Court in *Kayambu Pillai* v. *Lakshmi Ammani Ammal*[1].

By this civil revision petition the petitioners challenge the correctness of the learned Subordinate Judge's dismissal of their application. This petition came before Shahabuddin, J., who observed that no direct decision of this or of any other Court on the point had been cited to him and, as the question is one of general importance and bare of authority, he considered it desirable that it should be placed before a Bench.

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* C.R.P. No. 77 of 1945. 29th October, 1947.

1. (1938) 2 M.L.J. 137.

The provisions of Order 33 of the Code enable a person to make an application to the Court to be allowed to sue as a pauper and, if successful, thereby to be relieved from payment of court-fees at institution. Rule 1 defines a "pauper", an applicant must bring himself within the definition before leave can be given to him to sue *in forma pauperis*; in an application for leave, so far as status is concerned, the sole matter for consideration is the personal position of the applicant himself. Some additional provisions have been added to rule 1 by amendment in Madras, which relate to suits by persons acting in a representative character in respect of a pauper's estate or property; that position and those amendments do not arise in the present instance and can be ignored. So far as material in the present case, the right to sue as a pauper is peculiar to the individual and it arises from his own special status ascertained according to rule 1. Rule 5 provides for summary rejection of an application to sue *in forma pauperis*. When there has not been a summary rejection, then, by rule 7, the Court shall either allow or refuse to allow the applicant to sue as a pauper after holding a formal enquiry. Rule 15 provides that,

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Provincial Government and by the opposite party opposing his application for leave to sue as a pauper."

It has to be noticed that the bar is expressed to be upon "him", that is, the applicant who has been refused leave to sue as a pauper. The respondents' contention is that the word "him" in the rule, includes, impliedly, the applicant's legal representative or successor-in-title; and since, in the present instance, the father of the petitioners was refused leave and, consequently, was barred by rule 15 from making an application, so also are the petitioners because their rights, if any, to the property, devolved upon them from their father and thus they are hit by the same disability as that which affected their parent during his lifetime.

The approach to the problem, it seems to me, has not been made from the correct aspect. In his judgment, the learned Subordinate Judge made some observations regarding the petitioner's position to which I desire to refer. He said:

"The question is whether the petitioners, assuming they are now paupers, have a right to apply for leave to sue *in forma pauperis*, which right their father did not have after the dismissal (of his application in that behalf)."

Elsewhere he added:

"The bar," *viz.*, under rule 15 "must apply not only to him, the father, but to his representatives, because the properties, to recover which the representatives bring their suit, were got by them from the unsuccessful pauper applicant."

In my view, those observations reflect a confusion of thought and appreciation of the position. The right to sue must be distinguished from the method by which that right can be exercised. Assuming the petitioners inherited from their father the right to the properties and, it would follow, the right to sue for them, their right to sue arises out of devolution of the property upon them; they did not inherit from him the right to sue as paupers. The latter right can be theirs only if they can bring themselves within the definition of "pauper" in rule 1 of Order 33. Their right to sue for the property is one which is independent of a right, if they can establish it, to institute their suit *in forma pauperis*.

Although not cited to Shahabuddin, J., there are some relevant decisions in which the position of a "pauper" has been considered and to which reference is now convenient. In *Lalit Mohan Mandal* v. *Satischandra Das*[1], it was observed at page 1168 of the report that

"the right to make such an application (for leave to sue as a pauper) is obviously a personal right, and cannot survive in the legal representative, who may or may not be a pauper himself."

Again, in *Manaji Rajuji (Rao Sahib)* v. *Khandoo Baloo*[2], an observation is found, at page 281 of the report, that

1. (1906) I.L.R. 33 Cal. 1163. 2. (1911) I.L.R. 36 Bom. 279.

"The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation, and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix *in forma pauperis*, though admittedly he is not a pauper, simply because his testator or testatrix was a pauper."

The amendments by way of addition, previously mentioned, which were made to rule 1 in 1936 by this Court deal with the position and the question of an applicant seeking to sue as a pauper in a representative capacity. Those amendments were not the subject of consideration in the above decisions ; and, as already observed, do not arise and are not in point in the present instance. In both the decisions quoted, the right or the privilege of suing or continuing to sue as a pauper, is personal to the individual, that is to say, it arises in his favour by reason of his own individual status. If the right to make an application to sue *in forma pauperis* is a personal one which does not pass to a legal representative, then, it must follow, the bar upon it can affect only the individual who personally possesses the right. In *Radhakrishna Aiyar, In re*[1], which was decided before the Madras amendments to rule 1 were made, Jackson, J., referred to the two decisions, cited above, and held that the representative of a pauper could not continue a suit *in forma pauperis* if not a pauper himself; there the applicant sought to be allowed to sue *in forma pauperis* on the ground that he had derived that right from a deceased pauper and it was held he could not do so ; in other words, that the right to make an application to be allowed to sue *in forma pauperis* does not devolve from an individual who may be able to assert that right.

By way of emphasising that the bar in rule 15 relates to the "applicant" alone and not to his legal representative or successor-in-title, learned counsel for the petitioners referred to section 2 (1) of the Indian Limitation Act which defines "applicant" as including any person from or through whom an applicant derives his right to apply. There is not a similar provision in the Civil Procedure Code. Since the definition was necessary in the Limitation Act, so as to include other persons in "applicant" in addition to that individual himself, the absence in the Code of a similar provision is an indication that other persons are not included in that word or in the word "him" in rule 15.

On behalf of the respondents reference was made to *Ramakrishna Chetti* v. *Vuvvati Chengu Aiyar*[2], where, at page 496 of the report, it was observed that :

" In the next place a provision in a statute which gives a right to or imposes a liability on a person must be deemed to confer that right and impose that liability on the person's legal representative and if it confers that right or imposes the liability on that person as the owner of a certain property such right or liability is conferred or imposed on the assignee of such ownership right unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property or the original obligor."

It was contended that those observations are applicable to rule 15 so that the bar upon the applicant affects also his legal representatives and those who derive title from him. In my view the concluding words of the quotation show that the principle has not universal application without exception. The right to sue as a pauper is personal to the individual and, from that, it seems to follow that the bar in rule 15 must be restricted to the individual and does not extend to those who derive title from him. As already pointed out, the title derived by the petitioners is not that of suing as a pauper but a right to the property in respect of which there is also a right of suit which right is distinct and separate from the method of suing.

Counsel for the respondents placed considerable reliance upon the decision in *Kayambu Pillai* v. *Lakshi Ammani Ammal*[3], which the learned Subordinate Judge, in the Court below, appeared to consider covers the present matters. It was contended that that decision is conclusive and establishes that the petitioners are affected by the bar in the same way and to the same extent as was their father. There

1. A.I.R. 1925 Mad. 819.
2. (1914) 27 M.L.J. 494.
3. (1938) 2 M.L.J. 137

the facts and circumstances, so far as material, were the following: By Order 44, rule 1 of the Code the provisions of Order 33 applied to a pauper appellant; an appellant was given leave to appeal *in forma pauperis;* he entered into an agreement with reference to the subject-matter of the appeal by which another person obtained an interest in it; such an agreement, by Order 33, rule 9, enables the Court to dispauper the pauper litigant; the appellant then died and his executor was brought on record in his place but was not pauperised nor given leave to continue the appeal as a pauper; the respondent to the appeal made two applications: (1) to disallow the executor appellant from continuing the appeal *in forma pauperis* or to dispauper him; and (2) to direct the executor-appellant to furnish security for the costs of the respondent in that appeal; Horwill, J., granted the applications and a Letters Patent Appeal from his decision was dismissed by a Bench. In the judgment it was observed, at page 140 of the report, that the word "plaintiff" in rule 9 means "the plaintiff or his representative". Rule 9 provides that a Court may order the plaintiff to be dispaupered if "he" has entered any agreement with reference to the subject-matter of the suit by which another person obtains an interest therein. The "plaintiff" was the deceased pauper appellant who himself had made the disabling agreement and his appeal was sought to be continued by his executor; whilst in the judgment, at page 138, reference is made to dispaupering the executor, since he had not been pauperised he could not be dispaupered The effect of that decision in my view is that the appeal which had been instituted *in forma pauperis* by the deceased appellant and which had been continued after the death by his executor, who was not a pauper, was stopped from being prosecuted as a pauper appeal by reason of the conduct of the deceased pauper appellant, which, under rule 9, occasioned the character of the appeal to be forfeited. The first prayer in the application was to disallow the executor appellant from continuing the appeal *in forma pauperis* and that is what was ordered, as I understand the judgment in *Kayambu Pillai's case*[1]. In my view it is not in point in the present instance.

Whilst the petitioners inherited from their father the right to sue for the property, assuming that was the case, that inheritance did not include a right to sue *in forma pauperis.* Suppose the father, being a pauper, had made no application to sue as such and suppose the petitioners are in financial affluence, in those circumstances, they could not be granted leave to sue *in forma pauperis* on the ground of their inheritance of the property from a pauper and by virtue of his particular status as such. The corollary, it seems to me, must be that, since they cannot benefit from his status, they are not adversely affected by it, and the bar, which applied to him during his lifetime, does not extend to the petitioners.

In my opinion the right to sue *in forma pauperis* being a personal right of the individual who is given leave to sue as a pauper, and since there is nothing in rule 15 or in any other part of the Code by which the bar imposed upon the unsuccessful applicant is extended to any one else, such as his legal representative, successor-in-title or others, when an application to sue *in forma pauperis* is refused, the bar affects the applicant alone and does not extend to any other person. In respect of these observations I am not to be understood as having expressed any opinion regarding the right of a person seeking to sue *in forma pauperis* in any representative capacity, as provided by the Madras additions to rule 1 of Order 33, but my observations are confined and restricted to the facts in the present case where the petitioners-applicants wish to enforce their own personal rights to property by way of suit.

As part of his argument counsel for the respondents contended that unless the bar in rule 15 extends to persons other than the applicant who has been refused leave to sue as a pauper, the door is wide open for abuse; an example was given that, in the event of an application to sue *in forma pauperis* being refused and the bar in rule 15 then arising against the applicant, he could assign his rights to a pauper who in turn would be entitled to apply under the provisions of Order 33;

1. (1938) 2 M.L.J. 137.

and counsel urged that the assignee, in such an instance, should be as adversely affected as the assignor regarding the bar in rule 15. In respect of that argument I desire only to say that if there is any lacuna which might occasion abuse or injustice then that must be removed either by legislation or by means of the rule making powers conferred by section 122 of the Code.

For the reasons given, in my opinion, the dismissal of the petitioners' application on the ground that their father's application had been refused, was wrong. The petition is allowed ; the order of the lower Court set aside and the petitioners' application restored and remanded to the Subordinate Judge of Tanjore to hear and determine upon the merits. The petitioners are entitled to their costs in this revision petition.

Satyanarayana Rao, J.—I agree.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

T. M. Sivaprakasam Pillai, *In re* ... *Petitioner**

Indian Penal Code (XLV of 1860), section 211—Territorial jurisdiction in regard to an offence under—False charge made in letter posted from a mofussil station to a public officer in Madras—Offence where completed—Court at mofussil station, if has jurisdiction to take cognizance and try the accused for the offence under section 211.

The accused posted a letter at Kumbakonam addressed to the Inspector General of Police, Madras, wherein he alleged that a village munsiff of a neighbouring village had received illegal gratification. This complaint, on investigation was found to be absolutely groundless. The accused was charged before the Additional First Class Magistrate, Kumbakonam, of an offence under section 211, Indian Penal Code. On a petition to quash the proceedings on the ground that the Court at Kumbakonam had no territorial jurisdiction to enquire into the case,

Held, that the offence can be said to be completed only when the letter reached the destination, *i.e.*, the office of the Inspector General of Police, Madras. It cannot be said that by merely posting the letter, the accused had attempted to commit the offence. The Court at Kumbakonam which had taken cognizance of the offence had acted without jurisdiction and the charge framed has to be quashed.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings in C.C. No. 47 of 1947, of the Court of the Additional First Class Magistrate of Kumbakonam including the charge framed by the said Magistrate on 4th September, 1947.

V. Rajagopalachari, *K. Raja* and *R. V. Raghavan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) as Crown Prosecutor for the Crown.

The Court made the following

ORDER.—This is an application to quash the charge framed by the Additional First Class Magistrate, Kumbakonam, in C.C. No. 47 of 1947, wherein a charge under section 211 of the Indian Penal Code has been framed against the petitioner.

The short facts leading up to this prosecution are that the petitioner sent a communication to the Inspector General of Police, Madras, alleging that the Village Munsiff of Patteeswaram had received illegal gratification from one Thanu Kothan, an offence punishable under section 161 of the Indian Penal Code, and this complaint on investigation was found to be absolutely groundless. Thereupon a charge sheet was filed against the petitioner for an offence under section 211 of the Indian Penal Code. After having examined the prosecution witnesses, the learned Additional First Class Magistrate has framed the charge under section 211 of the Indian Penal Code.

In the statement filed by the petitioner, he objected to the jurisdiction of that Court for taking cognizance of this offence on the ground that there was no territorial jurisdiction for the Additional First Class Magistrate to enquire into the case.

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* Crl. M. P. No. 1660 of 1947. 8th December, 1947.

The complaint, though written and posted at Kumbakonam, was addressed to the Inspector General of Police, Madras, so that the offence under section 211 of the Indian Penal Code, *viz.*, that of falsely charging a person with having committed an offence took place only when the letter was received in Madras and opened in the Office of the Inspector General of Police, Madras. This contention was not accepted by the lower Court and therefore the petitioner comes up to this Court to have the charge quashed.

Reliance is placed on a decision of Sundaram Chetti, J., in *Rathinam Pillai* v. *Emperor*[1], for the proposition that the offence was committed only at the place where the false charge was laid and not at the place where the letter was posted. In that case, a letter containing alleged false information was posted at Kumbakonam and reached the District Superintendent of Police at Tanjore. The prosecution was initiated at Kumbakonam and the learned Judge therefore held that the offence was completed only when the information reached the Public Servant at Tanjore.

"If for some reason the information has not at all reached the public servant there will be no offence under section 182 of the Indian Penal Code though by reason of posting such a letter, the accused may be charged for having attempted to commit such an offence."

On this ground, the decision of that learned Judge was that the Magistrate at Kumbakonam had no jurisdiction to try the case and he was directed to return the complaint under section 201 of the Code of Criminal Procedure. Another case on which Mr. Rajagopalachari lays stress is that in the *District Magistrate of Cuddappah* v. *Syed Abdul Kareem*[2], where Horwill, J., in similar circumstances held that where a false complaint against a taluk office clerk that he demanded a bribe was sent to his superior officer, the Collector and the prosecution was launched at the place where the letter was written but not at the place where the letter was received, it was held that the trial was illegal as the Court had no territorial jurisdiction. The case in *Rathinam Pillai* v. *Emperor*[1], deals with an offence under section 182 of the Indian Penal Code and from the report it is not possible to find out what the offence was, that was the subject-matter of the prosecution in *The District Magistrate, Cuddappah* v. *Syed Abdul Kareem*[2]. Here the petitioner is charged with an offence under section 211 of the Indian Penal Code for falsely charging a person with having committed an offence.

The question for consideration is where was the false charge made. Is it at the place where the letter was posted or is it at the place where the letter was received? The communication of the false accusation is, in fact, the laying of the false charge and unless the matter is *actually* communicated to the superior officer it cannot be said that a false charge has been made out. If a person intending in his mind to make a false charge writes down something and keeps it to himself, such an act would not amount to "charging falsely". Therefore, the offence can be said to be completed only when the letter reached the destination, *i.e.*, the office of the Inspector General of Police, Madras. The decisions already quoted are authority, that in cases under section 182 of the Indian Penal Code the giving of false information becomes an offence only when it is actually imparted; much more so in a case under section 211 where the intimation becomes a false charge only when it is laid before the superior officer. The intention to do the criminal act is no crime and unless the charge is actually made that intention is not translated into action. The learned Public Prosecutor contends that by the mere posting of the letter, there is an overt act amounting to an attempt to commit an offence and relies upon the observations of Sundaram Chetti, J., in the case above mentioned. That learned Judge in spite of the suggestion thrown out, that the act might amount to an attempt to commit an offence, did not, in fact, decide to that effect. I do not consider that by merely posting the letter, the petitioner, in this case, has attempted to commit the offence. Moreover, the charge framed by the lower Court is not for an attempt to commit the crime. Though

1. A.I.R. 1932 Mad. 427.
2. (1943) 1 M.L.J. 467.

section 238 (2-A) of the Criminal Procedure Code lays down that where a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged, such a power presupposes the jurisdiction in the Court to try the offence charged. I can find no authority or justification for holding that a Court which has no territorial jurisdiction to enquire into and try an offence can do so and convict the accused of an attempt to commit the same even when it may have jurisdiction to enquire into and try the offence of attempt. In this view, the lower Court which has taken cognizance of the offence has acted without jurisdiction, and I therefore quash the charge framed and direct that the complaint or charge sheet may be returned for presentation to the proper Court.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.]

PRESENT :—MR. JUSTICE GOVINDA MENON.

Public Prosecutor ... *Petitioner**

v.

Nelliappa Pillai ... *Respondent.*

Criminal Procedure Code (V of 1898), section 471—Nature of order to be passed under—Order for detention of accused in the custody of a relative—Propriety.

As section 471, Criminal Procedure Code, now stands, it is essential that the accused should be "detained" in a "place". The words "detained" denotes the curtailment of liberty. It is obligatory upon the Court to order the detention in a place and not with a person.

Where a Court in issuing an order under section 471 (1) of the Code ordered the accused to be detained in the custody of his father-in-law and brother,

Held, that the order could not be sustained and has to be set aside.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions, Tinnevelly Division, dated 30th July, 1947, and made in S.C. No. 49 of 1947.

The Public Prosecutor (*V. L. Ethiraj*), petitioner, appearing in person.

Accused not represented.

The Court made the following

ORDER.—The learned Sessions Judge has found that the accused when he committed the murder was by reason of the unsoundness of mind incapable of knowing that he was doing an act which was contrary to law and hence has held that he was not guilty. This order was passed under section 470, Criminal Procedure Code and the consequential order necessary under section 471 (1) had therefore to be issued. The accused was ordered to be detained in the custody of his father-in-law and brother. The learned Public Prosecutor seeks to revise this order of detention on the ground that it does not conform to the provisions of the section. In *Legal Remembrancer* v. *Srish Chandra Roy*[1], a bench of that (Calcutta) Court has laid down that "detained in safe custody" in section 471 does not mean detained in the custody of the relatives. Kumaraswami Sastri, J., in *Mahommad* v. *Emperor*[2], was of the view that section 471 should not be interpreted as compelling a Court to send the accused to lunatic asylum. All that is necessary is to see that such safeguards are taken as to keep the accused from mischief and therefore it is permissible to order the accused to be kept under the control and custody of his parents. This

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* Crl. R. C. No. 1020 of 1947. (Cr. R. P. No. 917 of 1947). 5th December, 1947.

1. (1928) I.L.R. 56 Cal. 208.
2. (1921) 42 M.L.J. 72.

decision was passed on 28th October, 1931 when the word in the unamended section was "kept" which was altered to "detained" when the Criminal Procedure Code was amended in 1923. As the section now stands it is essential that the accused should be detained in "a place". The words "detained" denotes the curtailment of liberty. This is made clearer by the subsequent use of the words "in a place." Such being the case it is obligatory upon the Court to order the detention in a place and not with a person. The order of the lower Court cannot therefore be sustained and has to be set aside. The learned Public Prosecutor states that he is instructed to inform the Court that the accused should be detained in a mental hospital, which in this case is the mental hospital at Cuddalore according to the proviso to section 471, Criminal Procedure Code.

I therefore direct that the accused be detained in the mental hospital at Cuddalore subject to further orders of the Provincial Government.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Messrs. Vithalji Madhavji, Mangalore. *Applicants**

v.

The Commissioner of Income-tax Madras. *Respondent*

Excess Profits Tax Act (XV *of* 1940), *sections* 10-A (3) *and* 17 (1)—*Respective scope of appeals under—Decision under section* 10-A *that main purpose of a transaction was to reduce liability to excess profits tax—Right of appeal—If limited to special right under section* 10-A (3) *or includes general right of appeal under section* 17 (1).

In respect of a decision by the Excess Profits Tax Officer under section 10-A of the Excess Profits Tax Act that the main purpose of a transaction (transfer of the assessee firm's stock in trade and goodwill of the yarn part of the business to the son of a partner) was to reduce the excess profits tax liability, though it may ultimately affect the amount of excess profits tax, any person aggrieved has solely a right of appeal direct to the Appellate Tribunal under sub-section (3) of that section. He has not in addition a right of appeal to the Appellate Assistant Commissioner under section 17 (1) and from his decision a further right of appeal to the Appellate Tribunal under section 19 (2). The appeal in such a case cannot be said to be one objecting to the amount of tax so as to bring it within the purview of section 17 (1).

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Amendment Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax Amendment Act, 1939, (Act VII of 1939) in 66 R.A. No. 38 (Madras) of 1945-46 on its file for decision on the following questions of law, *viz.* :

(1) Whether in the circumstances of the case the Bench was right in holding that the appeal from an order by the Excess Profits Tax Officer lay to the Tribunal only?

(2) Whether the tribunal was right in the circumstances of this case in holding that the appeal filed by the Appellants against the order of the Appellate Assistant Commissioner was misconceived, and whether the consequent dismissal of the appeal by the Tribunal was right in law?

M. Subbaraya Aiyar for Applicants.

C. S. Rama Rao Saheb for Respondent.

The Court delivered the following judgments:—

The Chief Justice.—This is a case stated, at the instance of the assessees, by the Income-tax Appellate Tribunal pursuant to section 21 of the Indian Excess Profits Tax Act, 1940, (hereinafter called "the Act") which incorporated in the Act the provisions of section 61 of the Indian Income-tax Act, 1922. Two questions of law are referred to the Court, namely :—

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* Case Referred No. 51 of 1946. 10th November, 1947

(1) Whether in the circumstances of the case the Bench was right in holding that the appeal from an order by the Excess Profits Tax Officer lay to the Tribunal only?

(2) Whether the tribunal was right in the circumstances of this case in holding that the appeal filed by the Appellants against the order of the Appellate Assistant Commissioner was misconceived and whether the consequent dismissal of the appeal by the Tribunal was right in law?

The case requires elucidation of the meaning and effect of some provisions of the Act, the relevant portions of which it is convenient to set out. They are the following:

"Section 10-A (1).—Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected . . . . . was the avoidance or reduction of liability to excess profits tax, he may . . . . . make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the powers conferred thereby extend

(a) to the charging with excess profits tax of persons who, but for the adjustments, would not be chargeable with any tax or would not be chargeable to the same extent;

(b) to the charging of a greater amount of tax than would be chargeable but for the adjustments.

(3) Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal.

Section 14 (1).—The Excess Profits Tax Officer shall, by an order in writing . . . . . assess to the best of his judgment the profits liable to excess profits tax, and the amount of excess profits tax payable on the basis of such assessments . . . .

Section 17 (1).—Any person aggrieved by a decision made in pursuance of section 8 or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer . . . . . may appeal to the Appellate Assistant Commissioner:

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the second proviso to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that schedule.

Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of section 8, against any refusal to make modifications or against any modifications made by the Excess Profits Tax Officer under sub-section (8) of section 8, against any decision of the Excess Profits Tax Officer under rule 11 of the First Schedule or against any decision of the Board of Referees or the Central Board of Revenue.

Section 19 (2).—Any Excess Profits Tax Officer or any person in respect of whose business an order under section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under . . . . . Section 17 may . . . . appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922 . . . ."

Section 8 is of some length, it is unnecessary to set out all the terms and it suffices to state that it deals with dealing of, and decision upon, matters preparatory to an assessment to be made: sub-sections (5) and (8) relate to apportionments and modifications being made by the Excess Profits Tax Officer and each provides for an appeal to the Board of Referees against such apportionments or against the refusal to make or the making of modifications respectively. No special appeal is conferred in any other parts of section 8 and appeals from decisions upon matters arising in those parts is conferred by section 17 (1). When the Excess Profits Tax Officer makes a decision, pursuant to the section, he passes an order recording it and postpones making an assessment until either the period has expired during which an appeal against his decision can be preferred or, if there is such appeal, the appeal has received disposal by the Appellate authority.

Section 10-A was inserted in the Act by the Excess Profits Tax (Second Amendment) Act, 1941. The incident of subsequent addition can have no special significance when construing its meaning and effect; it must be construed as one of the provisions contained in the Act and as if it had always formed part of it.

Prior to September 30, 1941, the assessees carried on business as dealers in yarn and piece goods; on the above date the yarn part of their business, with its stock, goodwill and customers was transferred to one, Dhirajlal Vithalji, a son of one of the partners in the assessee firm. Dhirajlal carried on the yarn business in the same premises as theretofore. Since the assessable amount of the profits

made by Dhirajlal, during the year of account, following the transaction of transfer, was less than rupees 36,000 he was not chargeable to excess profits tax upon that profit; but if the yarn business had not been transferred and had remained part of the undertaking of the assessees, they would have been chargeable to excess profits tax upon the amount of profit made in yarns. The Excess Profits Tax Officer, being of opinion that the transfer to Dhirajlal was a transaction of which the main purpose was the reduction of the assessees' liability to excess profits tax, invoked sections 10-A (1) and (2) and made an adjustment by which he added Dhirajlal's profit to the assessees' profit and made an assessment upon the aggregate. By virtue of the adjustment the amount of the assessees' liability to excess profits tax was increased by about Rs. 16,000.

The Excess Profits Tax Officer's assessment order upon the assessees, dated 7th December, 1943, was made under section 14 (1) of the Act: the period of account is from October 1, 1941, (the day after the transfer of the assessees' yarn business to Dhirajlal on September 30, 1941 to September 30, 1942). In the assessment, the assessees' profit for the year, on their piece-goods business, is set out; also a small gross profit of Rs. 905 in yarns; the amount of Dhirajlal's profit is then stated; various additions to and deductions from those profits are made (to which reference is unnecessary) and the amount of the assessable profit is stated at Rs. 1,46,882 (including Rs. 23,282, the assessable profit made by Dhirajlal); upon the aggregate of Rs. 1,46,882 the amount of Rs. 60,106-11-0 (which includes about Rs. 16,000 in respect of the amount of Dhirajlal's assessable profit of Rs.23,282) is assessed as the excess profits tax charged upon the assessees. At the foot of the Excess Profits Tax Officer's assessment order, there is a note by the officer which is headed "Application of section 10-A of the Act," it concludes that

> "it is clear that the object of the assessees in giving up their yarn business in favour of Dhirajlal Vithalji and the main purpose in so doing was only to reduce their excess profits tax liability. I therefore hold . . . . that the profits earned by Dhirajlal Vithalji in yarn should be included in the profits of the assessees for determining their excess profits tax liability."

On 24th January, 1944, the assessees preferred an appeal under section 17 (1) of the Act to the Appellate Assistant Commissioner against the order of assessment, *inter alia*, challenging the correctness of the Excess Profits Tax Officer's conclusion that the transfer of their yarn business to Dhirajlal was to avoid payment of excess profits tax upon the profits derived from it, and requesting that the addition of Dhirajlal's profit of Rs. 23,282 should be deleted and their tax reduced accordingly. The correctness of that amount, as accurately representing the assessable profit, was not challenged. On 28th February, 1944, the appeal came before the Appellate Assistant Commissioner; he observed that he had no jurisdiction to entertain the appeal, but the appeal was kept pending. On 2nd March, 1944, the assessees preferred an appeal under section 10-A (3) to the Appellate Tribunal in regard to the same subject matter as in the other appeal; on 12th August, 1944, the assessees, through their advocate, petitioned for withdrawal of the appeal, stating that the matters concerned had been properly raised in the appeal under section 17 (1) and should be decided therein; on 16th August, the appeal under section 10-A (3) was allowed to be withdrawn and it was dismissed by the Tribunal. Incidentally that appeal had been preferred after the expiration of the period during which such an appeal could be made and, consequently, it could not have been effective. On 15th February, 1945, the appeal under section 17 (1) again came before the Appellate Assistant Commissioner; holding that he was not competent to hear an appeal relating to a matter under section 10-A and that an appeal against an action under that section lies only to the Appellate Tribunal, he rejected the appeal by the assessees. The assessees preferred an appeal under section 19 (2) to the Appellate Tribunal against the decision of the Appellate Assistant Commissioner. The Tribunal dismissed the appeal and in their order made on 12th November, 1945, it was observed that a right of appeal had expressly been given by sub-section (3) of section 10-A to the Appellate Tribunal regarding matters arising under that section also, that since the Appellate Tribunal already

had dismissed the assessees' appeal under section 10-A (3) with regard to the same subject-matter, it could not be reagitated before the Tribunal and that by means of the appeal under section 19 (2) the assessees were attempting to circumvent their order (of dismissal), allowing the appeal to be withdrawn.

Mr. Rama Rao Sahib for the Commissioner of Income-tax the respondent in this reference did not seek to support the correctness of the opinion expressed by the Tribunal that, by reason of its withdrawal and their dismissal of the assessees' appeal under section 10-A (3) the appeal under section 17 (1) (assuming such appeal lay) was incompetent. Previously, Mr. Subbaraya Aiyar, for the assessees, had contended that, since the appeal under section 10-A (3) had been withdrawn and, consequently dismissed and there had been no adjudication upon the merits of the appeal, the assessees were in the position of never having preferred an appeal and their right of appeal, if any, under section 17 (1) was unaffected by the withdrawal and dismissal of the other appeal. In support of his argument reference was made to *Abdul Majid* v. *Jawaharlal*[1], *Deoki* v. *Jwala Prasad*[2] and *Gundry* v. *Dunham*[3]. As the correctness of Mr. Subbaraya Aiyar's contention was not challenged, further consideration in that connection is unnecessary.

The sole matter for determination is whether, in respect of a decision by the Excess Profits Tax Officer under section 10-A which ultimately may affect the amount of excess profits tax, any person aggrieved has solely a right of appeal direct to the Appellate Tribunal under sub-section (3) of that section, or, in addition, he has a right of appeal to the Appellate Assistant Commissioner under section 17 (1) and from his decision a further right of appeal to the Appellate Tribunal under section 19 (2). Shortly, whether the Act has conferred concurrent rights of appeal in the instance above-mentioned. It is conceded that if there is a right of appeal under section 17 (1), it will follow that there is the further right of appeal under section 19 (2).

If an enactment is capable of two constructions, one of which leads to an absurdity and the other does not, the latter construction should prevail; a construction which leads to an absurdity should, if possible, be avoided. There is a general rule that where a special provision and a general provision are contained in the same Statute a case falling within the words of the provision must be governed by it and not by the terms of the general provision (per Quain, J.,) at page 232 in *Dryden* v. *Overseers of Putney*[4]. Section 10-A (3) conferring a right of appeal to the Tribunal, is a special provision in the Act; the right of appeal conferred by section 17 (1) is contained in a general provision. *Prima facie*, therefore, the special provision should prevail over the other and general provision so as to exclude the right of appeal conferred by section 17 (1) from cases covered by section 10-A (3).

It was contended for the assessees that, since the second proviso to sub-section (1) of section 17 excludes from the application of that sub-section matters in respect of which a special right of appeal is conferred elsewhere in the Act, namely, by sub-sections (5) and (8) of section 8, and since there is no such exclusion regarding matters for which a special right of appeal is given by sub-section (3) of section 10-A, the Legislature had not the same intention respecting the latter matters as it had, and has expressed, regarding the former and that a right of appeal under section 17 (1) against the amount of liability assessed in respect of matters falling under section 10-A, is not excluded by sub-section (3) of that section.

Section 17 (1) confers a right of appeal upon any person aggrieved by a decision made in pursuance of section 8 but by means of the second proviso, that right is excepted in respect of decisions under sub-sections (5) and (8) of that section. The effect, therefore, is that section 17 (1) confers a right of appeal regarding only some decisions, and not all under section 8 and the second proviso clarifies the

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1. (1914) 27 M.L.J. 17 : I.L.R. 36 All. 350 (P.C.).
2. (1928) I.L.R. 50 All. 608.
3. (1915) 7 T.C. 12.
4. L.R. (1876) 1 Exch. 223.

extent of the right. It has previously been pointed out that section 8 deals solely with matters anterior to the assessment. That proviso does not purport to deal with a right of appeal by which objection is taken to the amount of the liability for excess profits tax, which objection arises only after an assessment has been made. Elsewhere, the second proviso forbids a right of appeal against decisions of the Board of Referees (the appellate authority under sub-sections (5) and (8) of section 8) and of the Central Board of Revenue, both of which bodies deal with matters anterior to an assessment. The first proviso to sub-section (1) of section 17 denies a right of appeal against a determination of the amount of the profits of any standard period when they have been determined in accordance with rule 1 of the First Schedule. These matters, again, are anterior to an assessment.

As assessee is charged with excess profits tax by means of the assessment made upon him. Sub-section (1) of section 10-A empowers an Excess Profits Tax Officer to make such adjustments, as he considers appropriate, respecting liability to excess profits tax for the purpose of counter-acting avoidance or reduction of liability to tax; sub-section (2) (*a*) declares that the officer's powers, under sub-section (1), include power to charge any person affected by the section with excess profits tax. That charging must be by means of an assessment and the act of charging involves a decision in that behalf made by the Excess Profits Tax Officer by whom it is effected. Sub-section (3) provides for a special right of appeal against a decision by such officer under section 10-A.

The several exceptions, contained in the two provisos to sub-section (1) of section 17 do not deal with any matters directly relating to charging with tax or the making of an assessment, but, as pointed out, with matters anterior thereto. The incident of the inclusion of those exceptions connected with matters, different to the matters in section 10-A, does not, in my view, manifest either an intention that the right of appeal conferred by section 10-A (3) is concurrent with the right conferred by section 17 (1) or an intention of departure from the ordinary principle of construction that the special enactment in the former section should not prevail against the general enactment in the latter.

There are two constructions of the relevant provisions of the Act. Firstly, that there is only one right of appeal, in regard to matters in section 10-A, namely, an appeal direct to the Appellate Tribunal. Secondly, that there are concurrent rights, (*a*) the appeal direct to the Tribunal and (*b*) also an appeal to the Appellate Assistant Commissioner from whom an appeal lies to the Tribunal. The second construction inevitably leads to the absurdity that, in respect of an identical matter there is one appeal direct to the Tribunal and another, through the Appellate Assistant Commissioner to the same Tribunal. That could never have been the intention of the Legislature. The construction which avoids an absurdity should prevail.

Lastly, the learned counsel for the assessees, argued that section 17 (1) confers a right of appeal against the "amount" of tax liability and the appeal in this case is against that amount. As pointed out, there is no challenge to the amount, as such, but the grounds of the assessees' appeal to the Appellate Assistant Commissioner make it perfectly clear that the appeal is against the action by the Excess Profits Tax Officer in making the adjustments, by reason of his opinion and decision that the transaction of transfer to Dhirajlal was to avoid or reduce the assessees' tax and, it is alleged that that conclusion and decision were wrong. The appeal is not one objecting to the amount but is against the Officer's decision in relation to the purpose of the transfer. It can well be said that every appeal in connection with tax involves the amount of tax since every matter relating to tax is ultimately connected with its amount. But in the present instance the appeal is not against the amount, as such, but against the decision of the Excess Profits Tax Officer upon matters other than the amount of tax.

For the reasons given in my opinion the answers to both questions raised should be in the affirmative. The Commissioner of Income-tax is entitled to his costs, Rs. 250.

I desire to make it clear that the opinion which I have expressed relates to the facts and circumstances arising in the present reference.

PATANJALI SASTRI J. :—I agree that the questions referred to us should be answered in the affirmative. I wish however, to guard myself against being understood as holding that in no circumstances can an assessee have a concurrent right of appeal under section 10-A (3) and section 17 (1) of the Excess Profits Tax Act, 1940. Whether he is entitled to appeal under the one or the other .or both of those provisions depends, in my opinion, on the grounds on which he seeks to attack the order of the Excess Profits Tax Officer.

An assessment to excess profits tax involves a preliminary determination of various specific matters which affect the amount of tax payable by the assessees and the Act has provided for appeals against the decisions of the Excess Profits Tax Officer in respect of these matters to different appellate authorities which, in the opinion of the Legislature, are specially qualified to deal with such matters, while a general right of appeal against the assessments made by that officer is conferred under section 17 (1). Thus, in matters arising under section 8 sub-sections (5) and (8) and Rule 11 of the First Schedule a right of appeal to the Board of Referees is given, and in respect of matters dealt with under section 10-A and Rule 12 of the First Schedule an appeal lies to the Appellate Tribunal. That the appeals under section 8, sub-sections (5)and (8) relate to the specific matters therein mentioned is clear from the language of those sub-sections and of the second proviso to section 17 (1). Though in matters arising under section 10-A and Rule 12 the appeal is to be against the "decision" of the Excess Profits Tax Officer, it is clear from those provisions that the matters mentioned therein are specific preliminary matters and the appeals accordingly must relate only to those matters. Appeals under Rules 11 and 12 for instance, can only relate to apportionment of allowable deductions and disallowance of excessive expenses respectively. So, too, an appeal under section 10-A must, I think, be confined in scope to the "adjusments, as respects liability to excess profits tax", which the Excess Profits Tax Officer has made in the case of transactions designed to avoid or reduce such liability. In other words, though as a result of an "adjustment" made under section 10-A the assessment made under section 14 will no doubt be affected in that the amount of excess profits tax payable will be increased, the ground of attack in an appeal under section 10-A(3) must, as it seems to me, be confined to the Excess Profits Tax Officer's conclusion that "the main purpose" of the transaction or transactions was the "avoidance or reduction of liability to excess profits tax." Any other ground of objection to the amount "as assessed by the Excess Profits Tax Officer" can be taken only in an appeal preferred under section 17 (1) against his order of assessment.

This view receives further support from the statutory rules framed under section 27 of the Act and the forms prescribed in the schedule annexed thereto. Rule 15-A, clause (*h*) provides that an appeal against an order of the Excess Profits Tax Officer, "in so far as it concerns an adjustment made by him under section 10-A of the Act" shall be in Form E.P. 14 (T) which has a column under the heading "substance of the order made under section 10-A" and makes no reference to the amount of tax assessed by the Officer; whereas Rule 12 prescribes that an appeal under section 17 of the Act shall be in Form E.P. 10 "if against the amount of an assessment made. . . . . .under sub-section (1) of section 14 of the Act", and that form refers to the amount of profits liable to excess profits tax as determined by the officer and requires the petitioner to state the amount of profits liable to tax according to his claim. These provisions throw light on the respective scope of the appeals under section 10-A and section 17 making it clear that an appeal under section 10-A is concerned solely with the adjustment made by the Excess Profits Tax Officer on the basis that the "main purpose" of a transaction or transactions effected by the assessee was the "avoidance or reduction of liability to excess profits tax", while objections to the amount as assessed by that officer fall within the purview of an appeal under section 17. Thus appeals under sections 10-A (3) and 17 (1) are

mutually exclusive in scope, though they may be concurrent in the sense that both may be open to an assessee in a given case.

It is true and this is the sheet anchor of the argument on behalf of the assessee that while certain of the specific matters in respect of which special rights of appeal are provided for elsewhere in the Act are excepted under the second proviso to section 17 (1) from the purview of that sub-section the matter arising under section 10-A (3) is not so excepted and this omission, it is claimed, shows that, in addition to the right of appeal conferred under section 10-A (3), it is open to an assessee in an appeal under section 17 (1) "objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits tax Officer" to attack the latter's "decision" under section 10-A (3), as such decision affects the "amount of excess profits tax" and therefore comes within the purview of these words. The argument is plausible but cannot be accepted as sound. The omission to exclude the matter referred to in section 10-A or Rule 12 of the First Schedule is perhaps attributable to the fact that these provisions were inserted in the Act, by the Exceess Profits Tax (Second Amendment) Act, 1941, and the need for a consequential amendment of the second proviso to section 17 (1) was overlooked. Or it may be that, an appeal to the highest Income-tax appellate authority *viz.*, the Appellate Tribunal, having been provided for in the newly introduced provisions, it was considered unnecessary to exclude expressly the matters therein mentioned from the purview of an appeal to a subordinate authority provided for in section 17 (1). However that may be, having regard to the general scheme of appeals provided for under the Act which in no other case has sanctioned the incongruity of allowing an appeal in respect of the same matter to a superior and a subordinate authority concurrently, to be followed in the latter case, by further appeal under section 19 (2) to the same superior authority, I am convinced that the special appeal provided for under section 10-A in respect of the specific matter referred to therein was intended to be the sole and exclusive remedy of an assessee aggrieved by a decision under that section.

As, in the present case, the assessees' sole ground of attack against the assessment order related to the decision of the Excess Profits Tax Officer under section 10-A (1), his appeal on that ground to the Appellate Assistant Commissioner under section 17 (1) was incompetent and misconceived.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, AND MR JUSTICE GOVINDARAJACHARI.

Pallamreddi Audemma .. *Appellant**

v.

Pallamreddi Varadareddy and another .. *Respondents.*

Hindu Law—Maintenance—Step-mother—Right to maintenance—Nature and extent of—Arrears—Considerations in awarding—Costs of suit—Right to—Limits.

It cannot be said that a step-son under Hindu Law is under a personal obligation to maintain his step-mother. The step-mother is entitled to maintenance out of her husband's separate property as well as out of property in which he was a coparcener at the time of his death. Her right to maintenance should be based on the extent of the coparcenary property at the time of the suit and not as at the time of her husband's death. As regards separate property of her husband, the heir or devisee is the full owner subject only to the discharge of the obligation as to maintenance and there is no apparent principle on which it can be held that the widow would be entitled to have her maintenance enhanced if the heir or the devisee acquires more property, or that her maintenance should be reduced if he fritters away a portion of the property which he got from her deceased husband. The extent of the obligation of an heir or devisee to maintain a widow must be defined in terms of the estate existing at the time of the death of the last holder.

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* Appeals Nos. 262 and 393 of 1945. 7th November, 1947.

Case-law reviewed. *Srinivasa Iyengar* v. *Thirnvengadathaiyangar*, (1912) 25 M.L.J. 644 : I.L.R. 38 Mad. 556 and *Bala Tripura Sundaramma* v. *Suryanarayana*, (1914) 17 M.L.T. 188, distinguished.

There is no justification for decreeing any maintenance for any period prior to the suit which was launched without even a suit notice, where it is not unreasonable to infer that the plaintiff has impliedly abandoned the claim for the period prior to the suit.

Provided the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the plaintiff in a suit for maintenance should be given her entire costs and not the costs proportionate to her success.

Annapoornamma v. *Veeraraghava Reddi*, (1940) 1 M.L.J. 608, applied.

Appeals against the decree of the Court of the Subordinate Judge, Nellore, dated 21st November, 1944, in O S. No. 66 of 1944.

K. Subba Rao for Appellant in Appeal No. 262 of 1945.

K. Umamaheswaram for Respondent in Appeal No. 262 of 1945 and Appellant in Appeal No. 393 of 1945.

K. Subba Rao and *Y. Rama Reddi* for Respondent in Appeal No. 393 of 1945.

The Judgment of the Court was delivered by

Govindarajachari, J.—These two appeals arise out of a suit for maintenance filed on 5th December, 1940 by the appellant in A.S. No. 262 of 1945, against her step-son who is the appellant in A.S. No. 393 of 1945, and his paternal grandmother who was the second defendant in the suit. The plaintiff asked for future maintenance at the rate of Rs. 720 per year, arrears of maintenance at the same rate restricted however to the consolidated amount of Rs. 4,000 and a provision for expenses of plgrimage estimated at Rs. 280. She also alleged that scme of her jewels valued at Rs. 1,500 were with the defendants, and she prayed for their delivery or payment of their value. The learned Subordinate Judge of Nellore who tried the suit decreed the plaintiff's claim for maintenace at Rs. 360 per annum. He decreed arrears at the same rate but limited to three years prior to the suit. The claim for jewels or their value was negatived. Rs. 280 were directed to be paid to the plaintiff towards expenses of pilgrimage. The amounts decreed to the plaintiff were charged on items 15 to 76 of the plaint *A* Schedule.

In her appeal the plaintiff seeks enhancement of the rate of maintenance and also prays for a decree for Rs. 4,000 towards arrears. A direction is also sought as to her right of residence. The correctness of the decree granted by the Court below as to costs is questioned as also its finding as regards the jewels. In the appeal filed by the step-son (first defendant) it is argued that the plaintiff is not entitled to any maintenance at all as her claim was settled in 1913, that in any event the rate of maintenance should be reduced and the decree as to arrears vacated, that the charge should not have been imposed on what is described as almost the entire immoveable property owned by the first defendant and that it should be confined to a reasonable portion of the property.

The material facts and relationship may be shortly stated. The second defendant is the only child of one Chennuri Varadareddi and his wife Pitchamma. The second defendant married one Pallamreddi Mallareddi who admittedly had no ancestral property of his own. Seshureddi was the only child of this marriage. The plaintiff is Seshureddi's first wife, and the first defendant is his son by his second wife Kamalamma. Seshureddi married the first defendant's mother in May, 1912, and the plaintiff left the family house in 1913. Chennuri Varadareddi executed a will on 16th December, 1901 whereby he bequeathed his properties to his daughter, the second defendant and to his grandson Seshureddi. On 12th May, 1912, by which time Chennuri Varadareddi had died, Seshureddi and the second defendant divided the properties bequeathed to them by Varadareddi's will, Seshureddi taking 8 acres 23 cents of wet land, 6 acres 90½ cents of dry land and outstandings of the value of Rs. 1,487-10-0, while the second defendant took 9 acres 48⅓ cents of wet land, 6 acres 90½ cents of dry land and outstandings of the value of Rs. 3,012-10-0. An extent of 3 acres 6 cents of wet land and outstandings

of the value of Rs. 1,711-2-7 were allotted to the testator's widow Pitchamma for life with a remainder in favour of Seshureddi and the second defendant. It is recited in the deed of partition (Ex. P. 2) that as Mallareddi, the second defendant's husband, had no property of his own, some immoveable and moveable property was gifted to him, evidently referring to Ex. D. 18 whereby 2 acres 25 cents of wet land was given to him absolutely. This land remained in his possession and enjoyment till his death in 1927. The first defendant came of age in 1933. Considerable immoveable properties were thereafter acquired by him.

The learned Subordinate Judge finds that the extent of the properties owned by the first defendant on the date of suit is 44 acres of wet land and 20 acres of dry land including what was got from Chennuri Varadareddi and what the first defendant subsequently acquired. On the basis of certain leases exhibited in the case the learned Subordinate Judge estimates the income of each acre of wet land at half a putty and calculating at the rate of Rs. 65 a putty he assesses the annual income from the wet lands at Rs. 1,430 out of which he states that " the plaintiff's husband's share if he were alive on the date of the suit would be one half *i.e.*, Rs. 715 " ; but as the first defendant has to support his mother also the learned Subordinate Judge takes one half of Rs. 715 rounded off at Rs. 360 per annum and adopts this as the proper rate of maintenance awardable to the plaintiff. The income from the dry lands is left out of account as this is held to be just sufficient to pay the taxes on the entire lands dry and wet.

We have listened to very elaborate arguments from the learned Counsel on both sides, but it seems to us that the principal points arising for determination lie within a short compass.

It is first argued on behalf of the first defendant that the plaintiff's claim for maintenance was settled at Rs. 600 in 1913, and that she is consequently not entitled to claim any more maintenance out of her husband's estate. On her side the plaintiff put forward the case that in or about 1914, it was settled by certain mediators that she should be given 6 acres of land and a portion of a house in full satisfaction of her claim for maintenance and residence but that her husband resiled from that settlement and did not carry it out. The learned Subordinate Judge held that there was no settlement either in the manner alleged by the plaintiff or in the manner alleged by the first defendant.

In support of his case that the plaintiff's claim for maintenance was settled in 1913, the first defendant examined a mediator, D.W. 2 and his own grandmother D.W. 9. As we are in substantial agreement with the judgment of the learned Subordinate Judge on this matter it is unnecessary for us to deal with this question at any great length. In the first place it is highly improbable that the claim for maintenance of a young woman of 23 or 24 years would have been settled at the exceptionally low figure of Rs. 600. The first defendant alleges that a receipt was obtained from the plaintiff in acknowledgment of the payment of Rs 600 to her ; but this receipt has not been produced, and the explanation of the first defendant for its non-production is altogether unacceptable. All that he says in his evidence is that the receipt is "now missing" and that he suspects that the plaintiff's relations in the village took it from his house. He then refers to P.W. 1 and his two brothers who he says are related to the plaintiff, and states that they belonged to his faction and that they used to go through his papers in his absence. He admits in cross-examination that he never complained to the police about the loss of the receipt and that he never asked P.W. 1 and the others if they had taken it. It is curious that when P.W. 1. was himself in the witness box the only suggestion that was made to him in cross-examination was that "he looked into the first defendant's records in connection with a certain suit" which he, the first defendant and some others filed in the Court of the District Munsiff of Nellore. The evidence as to the loss of receipt is thus of the vaguest kind, and we are altogether unable to believe it.

Shortly after the deed of partition dated 12th May, 1912, whereby *inter alia* the tiled house in which the family was residing was allotted to the share of the

second defendant, the second defendant and her husband Mallareddi filed O.S. No. 1017 of 1912, in the Court of the Additional District Munsiff, Nellore against Seshureddi and the plaintiff for evicting the latter from the said house. Seshuredi did not defend the suit. The present plaintiff filed a written statement, but ultimately withdrew her contest and submitted to a decree reserving however her right of maintenance and residence. This reservation is embodied in Ex. P. 3.

In view of the strained relationship between the parties disclosed by these proceedings, it is most unlikely that if the plaintiff's claim for maintenance were settled as the first defendant alleges, there would not have been a document in writing to evidence the settlement, if not a registered document. D.W. 2, the alleged mediator, is unable to give any details of the settlement and contradicts himself to a certain extent as to its probable date, to which circumstance,. however, we do not attach much importance as the settlement took place a long time ago, if it took place at all. The second defendant who was examined as D.W. 9 says that she does not remember whether Rs. 600 was actually paid, and that she was not present at the time of the arrangement but was present only when the document was taken with regard to maintenance. She then adds that Seshureddi executed a document to the plaintiff for maintenance and that she cannot give the contents of the documents. The mediator D.W. 2 does not mention that there was any document embodying the terms of the arrangement or that Seshureddi executed a document in favour of the plaintiff, the first defendant's case being that there was only a receipt obtained from the palintiff in token of the payment to her of the amount settled to be paid in full satisfaction of her claim. In these circumstances, we agree with the learned Subordinate Judge that the settlement alleged by the first defendant has not been made out.

The main contest between the parties is as to the amount of maintenance which may legitimately be awarded to the plaintiff. It has been argued by Mr. Umamaheswaram on behalf of the first defendant that the first defendant is liable to maintain the plaintiff only because he has succeeded to the property of Seshureddi as heir, that the plaintiff's maintenance must therefore be assessed having regard to the extent of the estate left by Seshureddi at his death in 1920 and that the later acquisitions by the first defendant were made with the help of monies borrowed by him from his grandmother, the second defendant or from others or with the help of gifts made to him by the second defendant from time to time. He contends further that even if those acquisitions were rightly taken into consideration in assessing the plaintiff's maintenance, adequate allowance should have been made by the learned Subordinate Judge for the debts which the first defendant had to borrow from his grandmother or from others for making those acquisitions. He states that the debts amounted to about Rs. 16,000 and complains that the learned Subordinate Judge was not justified in not accepting as genuine the account books produced by the first and second defendants to prove the loans given by the second defendant and that the learned Subordinate Judge also erred in not giving the first defendant an adequate opportunity of examining his other creditors or their clerks and to exhibit their account books to establish the first defendant's borrowings from them. The correctness of the figures as to the extent of the properties owned by the first defendant at the time of the institution of the suit is also questioned.

While supporting the accuracy of the figures adopted by the learned Subordinate Judge regarding the extent of the property owned by the first defendant at the time of the institution of the suit and his finding that the first defendant acquired properties after 1933 from out of the income of the properties which he got in 1920 and without the help of any loans from the second defendant or any body else. Mr. Subba Rao, the learned advocate for the plaintiff, argues that the estimate as to the income made by the learned Subordinate Judge is unduly low and that if a proper estimate is made his client should have been awarded maintenance at the rate of Rs. 60 per mensem, that it was quite open to the Court to take the

entire property into consideration at the date of suit and that the first defendant's liability cannot be restricted to or based upon the extent of the property to which he succeeded in 1920.

There was some discussion before us as to whether the partition of 1912 between Seshureddi and the second defendant was real or was a mere sham. The learned Subordinate Judge was inclined to treat it in the latter way, but we do not think that there is any justification for it. There is no doubt some suspicion that the tiled house in which the family was living was specially allotted to the second defendant in order to enable her to turn the plaintiff out of the house, the plaintiff and the second defendant being admittedly at loggerheads for sometime previously. But this, in our opinion, is insufficient to sustain the finding that the transaction was not intended to be acted upon. We do not see anything strange or suspicious in the allotment of some property to Pitchamma for life for her maintenance. She was certainly entitled to be maintained out of the properties of her husband Varadareddi. The allotment of three acres and odd and of about Rs. 1,700 of outstandings cannot be said to be in excess of her right. No suspicion need attach either to the gift of 2 acres 25 cents of land to Mallareddi. On Mallareddi's death that property would devolve on Seshureddi and not on Mallareddi's wife, the second defendant, and if the object of the parties in entering into the partition was to prejudice the plaintiff's right of maintenance that object cannot be achieved by giving Mallareddi any property. Besides, the extent of the property given to him was quite negligible. There is no undue disparity between the shares allotted to Seshureddi and the second defendant, and it must be remembered that even if the partition were not there the second defendant would be entitled to a half of her father's property under his will, Seshureddi being entitled only to the other half. The partition therefore must, in our opinion, be treated as one binding on the parties.

It is claimed on behalf of the plaintiff that the first defendant is bound to maintain her irrespective of the possession of any property, and that the learned Subordinate Judge was therefore quite justified in having regard to the comparative affluence of the first defendant at the time of the suit in estimating the maintenance awardable to the plaintiff and that in this view it is unnecessary to find out how the first defendant acquired the several properties, as the only point relevant according to this argument would be as to what property he owned at the time when he was sought to be made liable.

We are unable to accept the proposition that a step-son under Hindu law is under a personal obligation to maintain his step-mother. At page 603 of Mullah's Hindu Law, 10th edition it is stated that,

> "A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents whether he possesses any property or not."

In the notes to this section it is further stated that, a Hindu is not under a personal obligation to maintain his sister, his step-mother, his daughter-in-law, or his sister-in-law, though the obligation to maintain them may arise from possession of property. At page 604, under section 544 this proposition is reiterated as follows :

> "A step-son is under no personal obligation to maintain his step-mother ; but if he inherits his father's estate, he is bound to maintain her out of the estate, she being a person whom his father was legally bound to maintain as his wife."

Bai Daya v. *Natha Gobindlal*[1], and *Narbadabai* v. *Mahadeo*[2] are cited in support.

In Mayne's Hindu Law, 10th edition at page 824 it is declared that,

> "The maintenance of a wife, aged parents and a minor son is a matter of personal obligation arising from the very existence of relation and quite independent of the possession of any property, ancestral or acquired."

Under footnote (*z*) is given *Bai Daya* v. *Natha Gobindlal*[1], which is quoted evidently with approval. In that case it was definitely held that the obligation to maintain one's parents does not extend to one's step-mother.

1. (1885) I.L.R. 9 Bom. 279.
2. (1880) I.L.R. 5 Bom. 99.

Mr. Subba Rao's principal reliance is on *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*[1], which was followed in *Bala Tripurasundaramma* v. *Suryanarayana*[2]. In *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*[1], it was held that the mother of a coparcener is entitled to have a provision made for her maintenance out of the entire family property including the share of her step-son as well as the share of her own son. Mr. Subba Rao argues that the word "mother" includes a step-mother, but in what context it is so included is clearly pointed out by Sundara Aiyar, J., at page 566 in *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*[1]. The learned Judge first quotes the text of Vyasa which states :

> "Even childless wives of the father are pronounced equal sharers and so also are all the paternal grandmothers : they are declared equal to the mothers,"

and then goes on to apply the text to a case where the right of maintenance is sought to be enforced against the share of the claimant's husband which had gone by survivorship to her son and step-son.

In *Papamma* v. *Apparao*[3], it is pointed out that etymologically the word "Matha" refers to the natural mother, that in its primary sense it connotes only the natural mother, and that while in a secondary sense it may include a step-mother

> "there must be a special reason either in the subject-matter of the text or in the context for departing from the ordinary meaning."

Dealing with the right to give away a son in adoption it was held in this case that it is confined to the natural mother and does not extend to a step-mother.

In *Kumaravelu* v. *Virana Goundan*[4], which among other decisions is approved in *Papamma* v. *Apparao*[3], it was held that a step-mother is not entitled to succeed to her step-son in preference to a sapinda. In *Navaneethakrishna Marudappa Thevar* v. *The Collector of Tinnevelly*[5], reference is made at page 671 to a long line of cases in Madras which have consistently held that a step-mother is not a mother for the purpose of the law of inheritance. In contrast it is pointed out at page 666 in the same decision that in dealing with partition it is made clear by the text and commentaries that a mother includes a step-mother. Dealing with the text of Manu on which the personal obligation of a Hindu son to maintain his mother and father is based, it was ruled in *Bai Daya* v. *Natha Govindlal*[6], that the primary meaning of the word "Matha" is natural mother and that it is only in a secondary or figurative sense that it could mean step-mother, and that the conclusion that it is intended to be used in the latter sense must be drawn from the context or from a comparison of cognate texts. The learned Judges in *Bai Daya* v. *Natha Govindlal*[6], concludes that the expression "Mother" in Manu's text and the expression "parents" in the Mitakshara should be read in their natural sense, and that there is no legal obligation on the part of a Hindu to support his step-mother independently of family property.

We are in entire agreement with the view taken in *Bai Daya* v. *Natha Govindlal*[6], the correctness of which so far as we are aware has never been questioned. The decisions in *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*[1], and *Bala Tripurasundaramma* v. *Suryanarayana*[2], are clearly distinguishable as they deal with the right of a Hindu widow to be maintained out of her deceased husband's interest in the family property which on his death has survived to his coparceners, namely, her sons and her step-son. It may be pointed out that at one time under the law of the Mitakshara a Hindu mother was, at the partition of coparcenery property, entitled to be allotted a share equal to that of her son or step-son, and that the practice of allotting shares upon partition to females has long since become obsolete in southern India and that the right survives only as a right for provision of maintenance which must not in any case exceed the share of her son. (*See* Mulla's Hindu law, 10th edition, pages 399, 400 and 401 and *Subramania Chetti* v. *Arunachala Chetti*[7].)

1. (1912) 25 M.L.J. 644: I.L.R. 38 Mad. 556.
2. (1914) 17 M.L.T. 188.
3. (1893) 3 M.L.J. 80 : I.L.R. 16 Mad. 384.
4. (1882) I.L.R. 5 Mad. 29.
5. (1935) 69 M.L.J. 632.
6. (1885) I.L.R. 9 Bom. 279.
7. (1904) I.L.R. 28 Mad. 1 (8).

The next question that falls to be considered—and indeed this is the main question in the case—is as to whether the plaintiff's maintenance should be based on the extent of the property owned by the husband at his death or on the property owned by the first defendant at the time of the suit. Dealing with a widow's right of maintenance it is stated in Mullah's Hindu Law, 10th edition, at page 613 that,

> "A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance (1) out of her husband's separate property; also (2) out of property in which he was a coparcener at the time of his death."

It is admitted that Seshureddi had no coparcenery property when he died. As is recited in the deed of partition Seshureddi's father, Mallareddi had no property whatever and was therefore given by his son and wife 2 acres 25 cents out of what they got under Varadareddi's will. The property owned by Seshureddi in 1920 was the property which he got as legatee under his grandfather's will, the two legatees having divided Varadareddi's property by metes and bounds under the deed of partition of 1912.

It is not denied that the plaintiff has a right to be maintained by her step-son out of her husband's separate property which has devolved on him (the first defendant); but it is maintained on his behalf that the plaintiff's right of maintenance is limited to such property and that the later additions made by him to it must be altogether left out of account. On behalf of the plaintiff reliance is principally placed on the decision in *Manicka Mudaliar* v. *Sowbagia Ammal*[1]. Dealing with a case where a widow of a deceased member of a joint Hindu family claimed maintenance against her husband's brother and brother's sons who had considerably enlarged the family estate since the death of her husband, it was held that

> "the share the husband would get if he had been alive at the time of the suit should be taken into consideration and not the share, if any, he was entitled to on his death."

After pointing out that the property out of which the plaintiff sought to be maintained was joint family property, that the defendants took the plaintiff's husband's interest by survivorship and that it formed the nucleus of the subsequent acquisition, Sankaran Nair and Spencer, JJ., held in that case that the plaintiff would get a reduced rate of maintenance if the family income diminished and that on the same principle she should be entitled to an increased rate of maintenance if the family income expanded.

In *Veerayya* v. *Chellamma*[2], Wadsworth, J., held following *Manicka Mudaliar* v. *Sowbagia Ammal*[1], that

> "the maximum which can be awarded to a widow will be the amount of the income of the share to which her deceased husband would have been entitled had he been alive and a coparcener at the date of the suit for maintenance."

The learned Judge notices that in *Rangathayi Ammal* v. *Muniswami Chetti*[3], and *Subbarayulu Chetti* v. *Komalavalli Thayaramma*[4], the income of the husband's share was taken to be the income of the share which he would have got if a division had taken place in his lifetime, and that this was also apparently the basis of the decision in *Jayanti Subbiah* v. *Alamelu Mangammal*[5], in which the right of maintenance was treated as being limited to the share of the deceased husband which had come by survivorship to the coparcener. The learned Judge then observes that,

> "on this question of the date with effect from which the husband's share is to be estimated, there is a very clear ruling of a Bench of this Court in *Manicka Mudaliar* v. *Sowbagia Ammal*[1].

which is later than the case he first referred to. As the decision in *Manicka Mudaliar* v. *Sowbagia Ammal*[1], had not been challenged by subsequent rulings of this Court in the 24 years which had elapsed since the decision was passed the learned Judges took it to be authoritative and allowed maintenance on the basis of the income of the share to which the plaintiff's deceased husband would have been entitled on the date of the suit had he been alive and a coparcener.

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1. (1914) 27 M.L.J. 291.
2. (1938) 2 M.L.J. 822.
3. (1911) 21 M.L.J. 706.
4. (1911) 21 M.L.J. 493 : I.L.R. 35 Mad 347.
5. (1902) 12 M.L.J. 270 : I.L.R. 27 Mad. 45.

Mr. Umamaheswaram for the first defendant suggests that the conflict noticed by Wadsworth, J., must be resolved by a decision of a Full Bench. He points out that in *Rangathayi Ammal* v. *Muniswami Chetti*[1], it was assumed without demur that the widow's right to be maintained out of the interest of her deceased husband in the coparcenary property which on his death survived to the remaining coparceners should be calculated with reference to the share to which he would have been entitled if a partition had taken place between him and the remaining coparceners before his death, and that the law was stated in similar terms in *Srinivasa Iyer* v. *Lakshmi Ammal*[2], *Ramzan* v. *Ram Daiya*[3] and *Gurushiddappa* v. *Parwatewwa*[4]. It seems to us that it is unnecessary for the purpose of this case to decide whether the view indicated in *Rangathayi Ammal* v. *Muniswami Chetti*[1] or that taken in *Manicka Mudaliar* v. *Sowbagia Ammal*[5] is the correct one. All the cases which have been referred to in this context are cases where the claim for maintenance by a widow was directed against the coparcenary property in which at one time her husband was a sharer. If it is borne in mind that the widow's right of maintenance is the truncated right which still remains out of what was at one time a claim to a share of the family property, there will be no difficulty in recognising that as a necessary and logical consequence of the nature of the right possessed by the widow, her maintenance would be dependent upon the varying fortunes of the family. Her comforts would dwindle if the family property is reduced ; but if the family becomes more affluent, she will be entitled to participate in that affluence.

This line of reasoning, however, would seriously apply to a case where a widow is claiming maintenance out of her husband's separate property. During his lifetime the husband was under a personal obligation to maintain his wife irrespective of the possession of any property. On his death that obligation fastens to his separate property in the hands of an heir or devisee. It is well settled that in the case of a devise, which makes no provision for the maintenance of the testator's widow, the devise may not be invalid in its entirety, but the right of the widow to maintenance can be enforced against the property in the hands of those to whom it has been bequeathed. It is obvious, however, that if the heir or devisee is the full owner of the property subject only to the discharge of the obligation as to maintenance there is no apparent principle on which it can be held that the widow would be entitled to have her maintenance enhanced if the heir or the devisee acquires more property, or that her maintenance should be reduced if he fritters away a portion of the property which he got from her deceased husband. She is entitled to be maintained with the same degree of comfort and reasonable luxury as she had in her husband's lifetime, and when the obligation to maintain her arises out of the devolution of her husband's separate property under the law of inheritance or out of a testamentary disposition of the property by him she is not entitled to enlarged maintenance by reason of the subsequent growth of the property in the hands of the heir or the devisee ; nor can her maintenance be reduced on the ground that because of his imprudence a portion of the property was spent away or lost.

In Mayne's Hindu Law at page 829 after referring to the moral liability of a father-in-law to maintain his son's widow out of his own separate property and how when his sons or in their default, his widow, daughter or daughter's son, succeed to his estate that moral liability as transmitted to them on his death becomes in their persons a legal liability, it is stated that the measure of that liability is restricted to the amount of the estate to which they have succeeded, and that this rule obtains both under the Mitakshara and the Dayabhaga law. The decision in *Rajanikanta Pal* v. *Sajanisundaree Dassee*[6] is quoted in support of this proposition. We note that there was no discussion of this aspect either in the judgment of the Privy Council or in that of the Calcutta High Court (*Sajanisundaree Dassee* v. *Jogendra-chandra Sen*[7]) which was the judgment under appeal in the Privy Council. The

1. (1911) 21 M.L.J. 706.
2. (1927) 54 M.L.J. 530 at 538.
3. (1917) I.L.R. 40 All. 96.
4. I.L.R. (1937) Bom. 113.
5. (1914) 27 M.L.J. 291.
6. (1933) 66 M.L.J. 148 : L.R. 61 I.A. 29 : I.L.R. 61 Cal. 221 (P.C.).
7. (1930) I.L.R. 58 Cal. 745.

observation of the Judicial Committee however is entitled to weight and seems to us to be in consonance with the principle we have enunciated. It is true that the obligations of a father-in-law to maintain his daughter-in-law is a mere moral liability during his lifetime, while in the case of a husband there is a legal obligation to maintain his wife ; but this, in our opinion, makes no difference in dealing with the nature and extent of the liability of the heir who has succeeded to the property of the father-in-law in the one case or of the husband in the other.

No distinction has been or can be suggested between the husband's heir and the husband's devisee who may quite possibly be an utter stranger to the family. It would seem strange if a devisee from the husband could be directed to pay enhanced rate of maintenance to the widow when by his own efforts he made considerable additions to the property he got from the testator. The same principle should, in our opinion, be applied to an heir, and the extent of the obligation must therefore be defined in terms of the estate existing at the time of the death of the last holder.

This necessitates an enquiry into the extent of the estate in 1920 when Seshureddi died. It is not in dispute that the only addition which he made to the immoveable property he obtained under the deed of partition is an extent of 93 cents purchased under Ex. D-19 in 1914. There has been considerable discussion before us as to the extent of the outstandings possessed by Seshureddi in 1920. It has been contended on the one hand on behalf of the first defendant that the outstandings which Seshureddi got in 1912 of the extent of Rs. 1,487 must have been spent away in maintaining himself and his family till 1920 and on the expenses of his second marriage ; but this seems to us to be a mere speculation based on no tangible evidence. It is contended on the other hand, that the extent of the outstandings in 1912 must have been much larger than what is disclosed in the deed of partition ; but this theory too has no reliable evidence to support it. We are in agreement however with the learned Subordinate Judge in his estimate of the outstandings and cash belonging to the first defendant in 1933 at about Rs. 11,000. There is ample documentary evidence in support of it. (*See* Exs. P-8-b, P-8-n, P-8-m and P-8-o). The parties are undoubtedly thrifty and careful in the management of their properties. In view of the clearly established fact that Seshureddi had outstandings of the value of about Rs. 1,500 in 1912 and that the first defendant had outstandings and cash of about Rs. 11,000 in 1933, we would not be wrong in estimating the outstandings which Seshureddi would have possessed in 1920 at over Rs. 3,000. In any event the outstandings were not inconsiderable.

We are not impressed with the argument that the income from the wet lands would be appreciably more than half a putty of paddy per acre. The learned Subordinate Judge's estimate is based on leases, and apart from the exaggerated oral evidence on both sides there is no reliable material on which it could be said that the income would be distinctly larger even if the lands are cultivated by the first defendant himself. If we take the extent of the wet land owned by Seshureddi in 1920 at a little over 9 acres the income would be 4½ putties of paddy on the basis of the learned Subordinate Judge's estimate. In estimating their money value, however, it seems to us that we should take into consideration the prices that have prevailed since 1942 and not the prices that prevailed in 1940. It is admitted by counsel on both sides that for over four years, if not five, a putty of paddy has been selling at Rs. 140. On this basis the income from the lands owned by Seshureddi would be about Rs. 630. We see no reason not to accept the learned Subordinate Judge's estimate that the income of the dry lands is not likely to be much more than the taxes which have to be paid in respect of the entire wet and dry lands. The income from the estimated outstandings at the time of Seshureddi's death cannot, calculated at the rate of six per cent. per annum, be more than Rs. 180. Adding this to the income from the wet lands the total income cannot exceed Rs. 810 per annum.

It has been pointed out on behalf of the first defendant that his mother Kamalamma is entitled to maintenance as also the second defendant out of the properties owned by Seshureddi. It is said that the second defendant's properties should not be taken into account, reliance being placed for this purpose on *Annapoornamma* v. *Veeraraghava Reddi*[1]. That was a case of a claim for maintenance by a widow out of joint family property, and in view of what we have already said regarding the nature of that right there can be no quarrel with the proposition that a widow's claim to be maintained out of joint family property is absolute in the sense of not being liable to be reduced because of the possession of any property by her in her own right as stridhanam. Here however the position is different. The second defendant as also the first defendant's mother were entitled to be maintained by Seshureddi during his lifetime, and they are also entitled to look to this property for maintenance if it becomes necessary. But it does not necessarily follow that if the second defendant claims maintenance out of her son's estate she can ask the Court to exclude from consideration, the fact that she owns considerable property which is sufficient to maintain her. As regards the first defendant's mother she has a right to look to her son also for her maintenance could not therefore be thrown entirely on the property which her husband had at the time of his death. No claim has so far been made either by the second defendant or by the first defendant's mother for maintenance against him, and there is no reason to think that it will be made hereafter ; but even if any such claim should be made we do not see why in all the circumstances we have mentioned the plaintiff should be deprived of the provision of Rs. 360 per annum for her maintenance. The learned Subordinate Judge estimated that amount as necessary and sufficient for maintaining her in the manner in which she was being maintained by her husband. We have been shown no reason to differ from that conclusion. We therefore uphold the judgment and decree of the lower Court in regard to the quantum of the plaintiff's maintenance.

In the above view it is unnecessary for us to discuss whether the first defendant made out his case that the properties acquired by him between 1933 and 1940 were acquired without reference to the property he got from his father ; nor is it necessary to fix or settle the exact extent of the property owned by him in 1940. There is no dispute that he made considerable additions to the property he got from his father. We may however observe that the criticism on behalf of the first defendant that the learned Subordinate Judge did not give him a reasonable opportunity of proving the several debts which he alleged he owed to others has not been made out ; but we must at the same time observe that the learned Subordinate Judge was not justified in throwing any doubt on the genuineness or reliability of Exs. D-2, D-13 and D-14 which are respectively the first defendant's ledger, the second defendant's ledger and the second defendant's daybook. It is evident from the several seals which those books contain that they were in existence in 1932 at the latest. No adequate reason has been shown why these books should be regarded as having been concocted for the case. Whether and to what extent these books establish the first defendant's case that the second defendant made gifts of money to him or gave him loans with the help of which he purchased properties is quite another matter which for reasons already given we do not consider it necessary to discuss. In regard to the loans which he is alleged to have borrowed from others the first defendant himself states that he cannot say which particular lands he purchased with the money borrowed under each of the promissory notes executed by him in favour of those creditors. In view of our finding that the plaintiff's maintenance must be calculated on the basis of the property owned by her husband in 1920 and the estimate of the income of that property made by us, we do not consider that the plaintiff can legitimately ask for any larger maintenance than what has been decreed by the lower Court.

The next question of importance is that of the arrears. Both parties rely on the decision in *Sobhanadramma* v. *Narasimhaswami*[2]. The learned Subordinate Judge

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1. (1940) 1 M.L.J. 608.
2. (1933) 67 M.L.J. 712 : I.L.R. 57 Mad. 1003

himself refers to it in support of his view that the plaintiff should be given three years' arrears prior to the suit. In our opinion the plaintiff has totally failed to substantiate her case that she made a demand for her maintenance in 1933 and again in 1938. The alleged demand in 1933 rests on her sole testimony. P.W. 4 has been examined as the person through whom another demand was made in 1938, but P. W. 4 has shown himself to be an unreliable witness in so far as he deposes that the first defendant admitted to him that he had some jewels of the plaintiff with him. The learned Subordinate Judge rejected the plaintiff's claim in this regard, and as we shall show later in our judgment, we agree with him in this respect. That being so, it would be quite unsafe to act on the evidence of P. W. 4 that he made a demand on the first defendant on behalf of the plaintiff. The learned Subordinate Judge was himself not inclined to believe that any demand was made before the suit was actually filed. The result therefore is that for a period of 27 years from 1913 to 1940 there was no demand of any kind by the plaintiff, and in these circumstances it seems to us not unreasonable to infer that the plaintiff has impliedly abandoned the claim for the period prior to 1940. We do not therefore see any justification for decreeing any maintenance to the plaintiff for any period prior to the suit which was launched without even a suit notice. This part of the decree of the lower Court will therefore be vacated.

In regard to costs it has been argued by Mr. Subba Rao that it is the settled practice of this Court as pointed out in *Annapoornamma* v. *Veeraraghava Reddi*[1] to award to a plaintiff in a suit for maintenance her full costs of the suit even if her claim was not decreed *in toto* provided

> "the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due".

We think that the reason of the rule applies to this case, and that the plaintiff should be given her entire costs including the court-fee due on the plaint in the Court below in so far as they relate to the claim for maintenance. The learned Subordinate Judge has given the plaintiff her costs proportionate to her success. In this respect the decree of the lower Court will be varied.

The claim of the plaintiff that provision for her residence should be made in the family house can be shortly dealt with. As the learned Subordinate Judge points out, no such claim was made in the plaint itself, the plaintiff claiming only a consolidated amount of Rs. 60 for both maintenance and residence. This was estimated at Rs. 30 by the Court below and with that estimate we have already expressed our agreement. No separate provision for residence by way of allotting a portion of the family house for her use can therefore arise.

The only question that now remains is the claim of the plaintiff for her jewels. Here again, we agree with the learned Subordinate Judge that it is most unlikely that the plaintiff, a Hindu woman, would have left her jewels for so long with her husband or her mother-in-law or her step-son without making any claim whatever. The plaintiff's case is that she did not take her jewels with her when she left her husband's house in 1913. It is most unbelievable that no claim in this regard would have been made for in 27 years if there is any truth in the plaintiff's case. In Ex. P-3, the memorandum filed on the plaintiff's behalf in the suit relating to the tiled house from which she was sought to be evicted the plaintiff reserved her right to claim maintenance and residence but made no reservation whatever in regard to jewels. This also shows that her jewels could not have been left with her husband or her mother-in-law. We therefore agree with the learned Subordinate Judge that there is no substance in this claim.

Nothing has been said in the appeal about the provision for expenses of pilgrimage. This will therefore remain.

The result therefore is that the decree of the lower Court will be modified by the deletion of the provision as to arrears of maintenance and by awarding the plaintiff full costs of the suit in regard to her claim for maintenance. As regards

1. (1940) 1 M.L.J. 608.

the property chargeable with the plaintiff's maintenance it follows from our judgment that the plaintiff can at the highest claim a charge only on the immoveable properties owned by her husband at his death. The decree of the lower Court will therefore be modified by confining the charge granted to the plaintiff to the items of immoveable property owned by Seshureddi at his death. There will be no order as to costs of these appeals.

The Chief Justice.—I have had the advantage of perusing the judgment of my learned brother. I agree with the conclusions he expresses and the reasons given for them and I have nothing to add.

These appeals having been set down to be mentioned this day, the Court made the following

ORDER.—It is agreed by counsel for each party that the plaintiff will have a charge for the amount decreed to her on items 1, 2, 8, 9, 11 to 14, 19, 33 to 35 and 58 to 64 of plaint schedule A in substitution of the charge mentioned in the judgment.

K.S. ——— *Decree modified*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SIMONDS, LORD OAKSEY, LORD MORTON OF HENRYTON, M. R. JAYAKAR AND SIR JOHN BEAUMONT.

R.M.A.R.A. Adaikappa Chettiar .. *Appellant**

v.

R. Chandrasekhara Thevar *alias* Sundara Pandia Thevar .. *Respondent.*

Civil Procedure Code (V of 1908), *sections* 2 (2), 96 *and* 115—*Rule as to right of appeal in cases arising under special statutes—Appeal against order under section* 19 *of Madras Agriculturists' Relief Act—Competency —Jurisdiction to revise such an order under section* 115—*Madras Agriculturists' Relief Act (IV of* 1938), *section* 3 (ii) (a), *Proviso* (D)—*Person having a beneficial interest in certain villages charged with the obligation to maintain a charity—If an "agriculturist" within the meaning of the Act.*

Where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal.

Secretary of State for India v. *Chelikani Rama Rao,* (1916) 31 M.L.J. 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.) and *Hem Singh* v. *Basant Das,* (1936) L.R. 63 I.A. 180 : I.L.R. 17 Lah. 146 (P.C.), relied upon.

After a preliminary and a final decree in a mortgage suit an application was made in that suit under section 19 of the Madras Agriculturists' Relief Act asking that those decrees be amended in accordance with the provisions of that Act and that the debt might be declared to have been wholly discharged. The application was dismissed on the ground that the applicant was not an "agriculturist" within the meaning of that Act. On a question whether an appeal lay against such an order,

Held, that the order was not made in execution proceedings but was made in the suit and it amounted to the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, namely, whether the judgment-debtor was an agriculturist and entitled therefore to have his debt discharged or reduced under the Act. Hence the order was a decree within the meaning of section 2 (2) of the Civil Procedure Code and an appeal lay against it under section 96 of the Code even though the Madras Agriculturists' Relief Act conferred no right of appeal from an order of the Court made under section 19 of that Act.

Nagappa Chettiar v. *Annapurani Achi,* (1941) 1 M.L.J. 164 : I.L.R. (1941) Mad. 261 (F.B.), overruled.

That being so it would be wrong to entertain an application in revision against such an order since under section 115 of the Code there is no jurisdiction in revision where an appeal lies.

A compromise in a suit provided *inter alia* that "the plaintiff shall for the performance of annadhanam (free feeding), etc., in the chatram which she is running at *R*, for ever, enjoy the villages of *S*, *M*, *K* and *K*-1.................. and shall pay full tax for the nanja and punja lands of the said four villages as in the case of dharmasanam (lands)". On a question whether the representative of the plaintiff was an "agriculturist" within the meaning of the Madras Agriculturists' Relief Act,

* P.C. Appeal No. 8 of 1946. 29th July, 1947.

Held, that the more natural meaning to be ascribed to the compromise was that the four villages were to belong to the plaintiff in that suit but charged with the obligation of maintaining the charity which she theretofore carried on. The words do not appear apt to impose a duty upon the plaintiff of devoting to charity the whole of the income of the villages however much it might exceed the requirements of the charity in fact maintained by her. Hence, the plaintiff or her representative must be held to have a beneficial interest in those villages and as such would not be an "agriculturist" within the meaning of the Act entitled to relief thereunder.

C. S. Rewcastle, *K.C.* and *P. V. Subba Rao* for Appellant.

Cyril King, *K.C.* and *R. K. Handoo* for Respondent.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—These are consolidated appeals by special leave from two orders of the High Court of Madras, both dated the 27th January, 1942, the first setting aside in appeal an order of the Subordinate Judge of Ramnad at Madura dated 25th July, 1938, and the second setting aside in revision an order of the same Subordinate Judge made on the 9th February, 1939.

The substantial question for decision in these appeals is whether the respondent is an agriculturist within the meaning of the Madras Agriculturists' Relief Act (Act IV of 1938) hereinafter referred to as "the Act." But the appellant has argued as a preliminary point that, assuming the respondent to be an agriculturist within the meaning of the Act, the orders of the High Court which are under appeal were incompetent and that this appeal should succeed on that ground. It will be convenient to deal with this point first.

The facts relevant to the determination of this question are these :

On the 15th September, 1925, a final decree was passed in a mortgage suit, which was Original Suit No. 5 of 1921 on the file of the Subordinate Judge of Ramnad at Madura, in favour of the appellants or their predecessors in title against the predecessor in title of the respondent. For convenience, the parties interested from time to time in the mortgage decree will in this part of this judgment be referred to as the "decree-holders" and the person interested in the equity of redemption as the "judgment-debtor". Execution Proceeding No. 79 of 1933 was taken out to enforce the final decree and certain of the mortgage properties were advertised for sale, but before a sale had been effected the Act was passed in March, 1938. On the 8th July, 1938, the judgment-debtor made Execution Application No. 237 of 1938 to the said Subordinate Judge, which was intituled E.A. No. 237 of 1938 in E.P. No. 79 of 1933 in O.S. No. 5 of 1921, and was expressed to be made under sections 20, 19 and 8 of the Act, and sections 47 and 151 of the Code of Civil Procedure. The relief prayed was that the Execution Proceedings in E.P. No. 79 of 1933 and the auction sale then pending be stayed until the disposal of the question of the extent of liability of the petitioner for the debt under section 19 of the Act and a declaration that the debt was wholly discharged under section 8 of the Act. In order to appreciate the nature of this relief it is necessary to notice that under section 8 of the Act the debts of an agriculturist can be scaled down. Under section 19 it is provided, so far as material for the present purpose, that where a Court has passed a decree for the repayment of a debt it shall, on the application of any judgment-debtor who is an agriculturist, apply the provisions of the Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly, or enter satisfaction as the case may be. Section 20 provides that every Court executing a decree passed against a person entitled to the benefits of the Act shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under section 19, but a proviso to the section enacts that where within 60 days after an application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19, the decree shall be executed as it stands.

On the 25th July, 1938, Execution Application No. 237 of 1938, came before the Subordinate Judge who dismissed it summarily on the ground that the judgment-debtor was not an agriculturist. From that order an appeal was brought to the

High Court of Madras and that Court directed the learned Subordinate Judge to submit a finding whether the judgment-debtor was an agriculturist and if so, to what relief he was entitled under the Act. On the matter coming again before the Subordinate Judge on remand he heard evidence and delivered a detailed judgment on the 9th February, 1939. He found that the judgment-debtor was not an agriculturist within the meaning of the Act and was not entitled to any scaling down of the debt under the Act. Meanwhile, namely, on the 3rd August, 1938, the judgment-debtor had made an independent application I.A. No. 361 of 1938 in O.S. No. 5 of 1921 to the said Subordinate Judge asking that the preliminary and final decrees in the said mortgage suit be amended in accordance with the provisions of the Act and that the debt might be declared to have been wholly discharged. On the 9th February, 1939, after recording his findings in E.A. No. 237 of 1938 the learned Judge passed an order dismissing I.A. No. 361 of 1938, in view of his finding in E.A. No. 237 of 1938. The reasons for making this further application I.A. No. 361 of 1938 are not disclosed by the record but, presumably, the advisers of the judgment-debtor thought that it might be held that two applications to the Court were necessary, one under section 19 to the Court which passed the decree, and another under section 20 to the Court executing the decree as would be the case if the two Courts were different. The danger of limitation running under the proviso to section 20 had to be considered. But, as in the present case the two Courts were the same, and it is clear that both the Subordinate Judge and the High Court in considering whether the judgment-debtor was an agriculturist within the meaning of the Act were treating Execution Application No. 237 of 1938 as properly raising questions under sections 8 and 19 of the Act as well as under section 20, Application No. 361 of 1938 appears to have been redundant.

The judgment-debtor presented an appeal from the order of the 9th February, 1939, made in I.A. No. 361 of 1938, and that appeal came before the High Court of Madras at the same time as the appeal from the order of the 25th July, 1938, on its restoration with the findings of the Subordinate Judge on the matters remanded. But when the two appeals came before the High Court that Court was faced with a judgment of a Full Bench of the Court delivered in *Nagappa Chettiar* v. *Annapurani Achi*[1], in which it had been held that no appeal lay from an order passed under section 19 of the Act. The High Court held that in view of this decision the appeal against the order of the 9th February, 1939, which had been made under section 19 of the Act, was incompetent; but they had acceded to an application of the judgment-debtor to be allowed to convert his appeal into a Civil Revision Application and, holding that the Subordinate Judge had been guilty of material irregularity within the meaning of section 115 of the Civil Procedure Code, they set aside his order of the 9th February, 1939, in revision. The Court nevertheless dealt with the appeal against the order of the 25th July, 1938, as an appeal, and directed that the order of the Subordinate Judge of the 25th July, 1938, made in E.A. No. 237 of 1938, be set aside and the application remanded, and directed the Subordinate Judge to restore the said application to its original number in the Register, and to proceed to dispose of it according to law and in the light of the observations and directions contained in the judgment of the High Court. As the High Court, as hereinafter noticed, had expressed the view that the judgment-debtor had proved that he was an agriculturist within the meaning of the Act, these directions involved that the Subordinate Judge would deal with the Execution Proceeding before him under sections 8 and 19 of the Act.

Before considering the propriety and validity of the orders made by the High Court in the two appeals presented to them it is necessary, in the first place, to determine whether the decision of the Full Bench was right. The facts in the case before the Full Bench can be distinguished on the ground that in that case there were no proceedings in execution of the decree such as exist in the present case, but the Court expressed the view that the existence of execution proceedings would not

1. (1941) 1 M.L.J. 164 : I.L.R. (1941) Mad. 261 (F.B.).

make any difference. The view taken by the Full Bench was that section 19 of the Act conferred a particular right upon a judgment-debtor and that, as the Act conferred no right of appeal from an order of the Court made under the section, no appeal was competent. The Court relied to some extent on the decision of this Board in *Rangoon Botatoung Company, Limited* v. *The Collector, Rangoon*[1]. That case, however, has been explained in later decisions of the Board as depending on the fact that the proceedings were from beginning to end ostensibly and actually arbitration proceedings. Their Lordships are not in agreement with the view of the Full Bench of the High Court of Madras. The true rule is that where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal—see *Secretary of State for India* v. *Chelikani Rama Rao*[2] and *Hem Singh* v. *Basant Das*[3].

The question therefore to be considered in the present case is whether a right of appeal from the orders in question was conferred by the Civil Procedure Code. The order of the 9th February, 1939, was not made in Execution Proceedings but it was made in a suit and in their Lordships' opinion, it amounted to the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, namely, whether the judgment-debtor was an agriculturist and entitled therefore to have his debt discharged or reduced under the Act. In their Lordships' opinion the order was a decree within the meaning of section 2 (2) of the Civil Procedure Code and an appeal lay under section 96 of the Code. That being so the High Court was wrong in entertaining an application in revision, since under section 115 of the Code there is no jurisdiction in revision where an appeal lies. The order of the High Court setting aside the order of the Subordinate Judge of the 9th February, 1939, will have to be set aside, but this is not of any practical consequence since the application on which the order was made was redundant. The appeal against the order of the 25th July, 1938, was rightly entertained. That order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code and an appeal therefore lay under section 96.

The procedural questions having been thus disposed of upon the footing that an appeal lay against the order of the 25th July, 1938, it remains for their Lordships to consider the case on its merits. The single issue is whether the respondent has established that he is an agriculturist within the meaning of the Madras Agriculturists' Relief Act (IV of 1938) and as such entitled to debt relief. And this question may now further be narrowed down, since other matters of dispute are no longer raised, by saying that the only controversy is whether the respondent was at the relevant time within proviso (D) to section 3 (*ii*) (*a*) of the Act. This in turn will depend on whether the respondent had a beneficial interest in certain villages to which reference will be made or whether those villages were wholly dedicated to charity. In the former event the respondent was not an agriculturist within the Act; in the latter event he was.

In the consideration of this question their Lordships think it right to have regard not only to the materials which were before the Subordinate Judge but also to the documents which were properly admitted in evidence by the High Court. That Court in allowing the appeal from the Subordinate Judge was no doubt influenced by such documents and they are in fact of substantial importance in considering the merits of the case.

The relevance of this matter is apparent in the consideration of the documents the interpretation of which is all important in the decision of this case. A few words of introduction are necessary to their consideration.

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1. (1912) 23 M.L.J. 276 : L.R. 39 I.A. 197 : I.L.R. 40 Cal. 21 (P.C.).
2. (1916) 31 M.L.J. 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.).
3. (1936) L.R. 63 I.A. 180 : I.L.R. 17 Lah. 146 (P.C.).

It appears that in the year 1843 there was litigation in the Madras Adalat Court in regard to the succession to the Ramnad Zamindari after the death of the late Zamindar between his widow Parvathavardhani Nachiar and his mother Muthu Veerayi Nachiar who set up rival claims to the estate, the latter being plaintiff in the suit and the former one of the defendants. The suit was eventually compromised upon certain terms. The Subordinate Judge had before him a document which is described as a certified copy of the special vakalat given by one of the parties to her pleader to compromise the suit. This document embodied the terms of compromise and in the absence of better evidence was no doubt admissible in evidence. The learned Judge had also before him an unsigned document described as a draft compromise which, even if admissible, could be of little value. These documents can now be disregarded, for their Lordships have (as the High Court had) the advantage of seeing the authentic razinama or deed of compromise which was signed by or on behalf of the parties. This document (which is Ex. WW in the proceedings) after stating the parties and the nature of the proceedings sets out in full the terms of compromise. It provides by clause 1 that the first defendant shall not only enjoy throughout her lifetime the "Ramnad Zamin, etc., all plaint-mentioned properties as have now been carried to her but shall also adopt a son whom she may like as mentioned in the supplemental rejoinder" and that the son to be so adopted shall after her lifetime enjoy the said Zamindari with all properties from son to grandson and so on in succession. Clause 2 provides for certain yearly payments to be made by the first defendant to the plaintiff out of the income of the Zamindari, clause 3 provides for certain other payments, clause 4 for the enjoyment by the plaintiff of a certain bungalow, and clause 5 for certain immaterial matters. Then come the material clauses 6, 7 and 8 which are as follows :—

"6 The plaintiff shall, for the performance of *annadhanam* (free feeding), etc., in the chatram which she is running at Ramnad, for ever, enjoy the villages of Siruvayal, Manjakulam and Kadambur in the Cusba taluk of the said zamindari and the village of Kilapanaiyur in Chikkan taluk, in all four villages of the total extent of one thousand kalams *virayadis* (seed extent) as also the palace tope situate on the southern bund of the Lakshmipuram tank in the Ramnad Fort area and shall pay full tax for the nanja and punja lands of the said four villages as in the case of *dharmasanam* (lands).

7 Out of the net amisham (income) of the said zamindar during the administration of the Court of Wards and previous thereto, the amount invested in company, for interest and since drawn and deposited with the Collector, is Rs. 6,74,983. The documents relating to Rs. 3,37,491-8-0 out of this, shall be received by the plaintiff and the documents relating to the balance of Rs. 3,37,491-8-0 shall be received by the first defendant, through Court, by granting receipt. The plaintiff shall enjoy as she pleases all the properties got by her under this razinama and all other properties remaining in her possession.

8. For the manovarti melchilavu (the monthly private and personal expenses) of the plaintiff, she shall enjoy the six sivuthettu pangus, belonging to the zamindari, in Dharmasanam Kannivayal village, Sivaganga zamindari segaram, with powers of alienation such as gift, exchange, sale, etc."

There is nothing else in the razinama which appears to be relevant.

It is this document which the respondent adduces as conclusive evidence that the four villages in question were freely dedicated to charity, that neither the plaintiff in the 1843 suit nor he, as claiming through her had any beneficial interest therein, with the consequence already stated that he established his right to be deemed an agriculturist within the Act. This is the contention which the High Court has upheld.

Their Lordships cannot take the same view of the document. It must be observed that the origin of the charity is not to be found in it. That is clear from the reference to the "chatram which she is running at Ramnad". It cannot be inferred that the four villages had at an earlier date been dedicated to charity. All that can be gleaned from the document is that the plaintiff was at that date carrying on the chatram, and it was natural and proper that upon a division of the disputed zamindari such an appropriation should be made to her as would enable her to continue to do so. It appears to their Lordships that, while the language used may not be free from ambiguity, the more natural meaning to ascribe to it is that the four villages were to belong to the plaintiff but charged with the obligation of maintaining the charity which she had theretofore carried on. The words do

not appear apt to impose a duty upon the plaintiff of devoting to charity the whole of the income of the villages however much it might exceed the requirements of the charity in fact maintained by her. There is, no doubt, force in the observation made by the High Court that, if a donor was making a gift of property burdened with the performance of a charity, one would expect to find that the charity was to be conducted according to a fixed dittam or standard of expenses after meeting which the surplus income was to be enjoyed by the donee. But it appears to be a sufficient answer to this point that the nature of the charity itself supplied a sufficient standard. The maintenance of a choultry for the feeding of travelling pilgrims would normally require a sum which varied from time to time and could not easily be defined in the terms of so many rupees a year no more and no less. It appears to their Lordships in accordance both with the probabilities of the case and with the language of the document to conclude that, an estimate being made of the probable expenses of the charity and of the income of the villages, an appropriation was upon the division of the zamindari made to the plaintiff which would enable her to carry on the charity but would leave her free to retain for her own use any surplus after that purpose had been satisfied. The alternative view is one that would involve a cypres application of the surplus to some other charitable purpose in the event of the income exceeding the needs of the particular charity. In the circumstances of the case there seems to be little justification for ascribing to the parties a general charitable intention which alone would justify such an application.

To this conclusion their Lordships come upon a consideration of the document which is now more than a hundred years old, but it is desirable to make some observations upon other aspects of the case.

The dispute being whether or not the respondent had a beneficial interest in the four villages, it is a strange course of events which leads to his repudiation of the view normally favourable to him. For he denies such a benefit with a view to a different advantage. This places an opponent, who would assert just that which the respondent might be expected to assert and would be in the best position to prove, in a position of peculiar difficulty. The exact nature of this charity has been discussed but not decided in other proceedings and it was said in Appeal No. 128 of 1922 in the course of a judgment in the High Court at Madras

"Unless and until it is found in a regular suit instituted by someone interested in the trust that the whole income is devoted to charity, the decree in the present suit must provide that the maintenance should be a charge on the surplus funds if any derived from these villages and the lower Court's decree must be amended in so far as it directed a charge on the villages themselves."

The suit, in which this appeal has been brought, raises the precise question indicated in the cited judgment. It cannot but be regarded as unfortunate that the claim of the charity should now be vindicated by one whose conduct has not been consistent with that claim. Their Lordships agree with the High Court that, if the terms of the razinama of 1847, were unambiguous in favour of an entire dedication to charity, the diversion of any part of the income to other purposes by a trustee could be disregarded, but, holding as they do that the better construction of the deed is otherwise or that at the lowest there is an ambiguity, they cannot altogether ignore that the respondent who now advances the claim has hitherto not been vigilant in asserting it but on the contrary, as the learned Subordinate Judge has pointed out, has acted as if he had a beneficial interest in the surplus income. It must at least be said that for him it becomes difficult in his own interest to affirm what his previous conduct has denied.

It is, however, not only the conduct of the respondent himself which has been discussed in the Courts in India. The earlier history of the case between 1847 and the death of the respondent's father in or about 1920 has also been investigated and different views have been taken as to the inferences to be drawn from divers documents and transactions. Their Lordships have carefully considered these matters and it appears to them that they do not point decisively in favour of one view or the other. There are no doubt references which suggest a dedication of the

entire income to charity : these are exhaustively examined in the careful judgment of the High Court. But in almost every case the language used would be equally appropriate, or at least not inappropriate, if the income was not wholly dedicated to, but only charged in favour of, charity, and it must not be forgotten that if in fact the whole income is at any time required for the charity, the two things are in effect the same. Nor would it be right to give much weight to expressions of doubtful import where the question now under consideration did not arise. One example out of many must suffice. In 1879, the question had arisen whether the charity was being properly maintained. A report appears to have been made by the Tahsildar of Ramnad Taluk. The Head Assistant Collector wrote a letter in regard to it and upon this letter the Vice-President of the District Board, Madura, wrote an endorsement which contained these words :

". . . . . the present trustee M. Muthuduraiswami Thevar seems to have been doing his best for the choultry in spite of the several inconveniences caused him by Kolanda Nachiar, his aunt. He will however it is hoped repair the second portions of the building, as there seems to be a good balance in favour of the choultry."

This statement, assuming it to be admissible evidence against the respondent, is conclusive that there was a charity but it is of little significance upon the question whether after the needs of the charity have been satisfied the surplus belongs to him.

Their Lordships have thought it proper to refer to these matters, because, the High Court having taken a different view of the construction of the razinama, it would not be right to assume that it is free from ambiguity. But they do not find in the transactions or conduct of the parties whether more or less contemporaneous with the deed anything which would lead them to depart from the meaning which they themselves attach to it. They must conclude therefore that the respondent has not established that he is an agriculturist within the meaning of the Madras Act and as such entitled to relief. They will humbly advise His Majesty that this appeal should be allowed and the decision of the Subordinate Judge of the 25th July, 1938, restored. The respondent must pay the appellants' costs of this appeal and of the proceedings in the High Court.

Solicitors for Appellant : *Hy. S. L. Polak & Co.*

Solicitors for Respondent : *Douglas Grant and Dold.*

V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Vathyam Balarama Sastri .. *Appellant**

v.

Vavilala Vasudeva Sastri .. *Respondent.*

Compromise—Settlement of outstanding disputes between parties—Consideration—Appellate tribunal—When justified in reversing decision of trial judge on a question of fact.

Where a plaintiff bases his claim on an agreement made between him and the defendant recording a compromise arrived at between them for the settlement of outstanding disputes in relation to the estate of a deceased relation of theirs and it is resisted on the ground that the agreement was without consideration, the decision of the question depends upon whether the plaintiff had a *bona fide* claim to the property which was the subject of the agreement of compromise.

An appellate tribunal is justified in reversing the decision on a pure question of fact, as to the existence or otherwise of consideration for an agreement, arrived at by the trial judge who had had the advantage, denied to it, of seeing and hearing the witnesses, if there is no justification for the finding arrived at by him.

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* P.C. Appeal No. 32 of 1946. 30th July, 1947.

Sir Herbert Cunliffe and *P. V. Subba Rao* for Appellant.

S. P. Khambatta and *R. Parikh* for Respondent.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—This appeal from a judgment and decree of the High Court of Judicature at Madras, which reversed a judgment and decree of the Court of the Subordinate Judge of Guntur, raises a pure question of fact and it appears to their Lordships that the only matter for their consideration is whether the appellate tribunal was justified in reversing the judgment of the trial judge who had had the advantage, denied to it, of seeing and hearing the witnesses.

The suit in which this appeal is brought was instituted by the present respondent, who claimed against the present appellant to be entitled to two-thirds of the cash standing to the credit of one Vathyam Verri Janikamma, then lately deceased, at certain banks. This claim was based on an agreement made between the parties dated 7th March, 1940, which in fact recorded a compromise arrived at between them for the settlement of outstanding disputes in relation to the estate of Janikamma.

The claim was resisted by the appellant on the ground that the agreement was brought about by fraud, misrepresentation, coercion or the undue influence of the appellant's own natural father, Bhogappayya Sastri, and it was rejected by the Subordinate Judge on the ground that the agreement was without consideration and was brought about by the undue influence alleged.

So far as the plea of undue influence is concerned, their Lordships have searched the evidence in vain for anything which could justify the conclusion to which the Subordinate Judge came. Apart from the difficulty, a grave one indeed, which faces the appellant under section 16, Contract Act, it appears to their Lordships that upon the facts the High Court was amply justified in holding that the appellant had not made out his case.

There remains the question whether any consideration moved from the respondent to support the agreement. This depends upon whether the respondent had a *bona fide* claim to the property which was the subject of the agreement of compromise. It is in their Lordships' opinion clear that he had such a claim. The respondent was a son of Ramalinga Dikshitulu, a brother of Janikamma, and therefore was her nephew. He had lived on terms of affection with her. The appellant had been adopted in 1916, as the son of Janikamma and her husband who had died long before that date. The disputes between him and Janikamma had been serious. She had been born in a wealthy family and had a widow's estate in her late husband's property and she had saved substantial sums part of which she had invested. Here was room for controversy with the adopted son and that there was controversy is beyond doubt, he asserting and she denying that the property was his. In April, 1935, she made a will in which she expressly asserted her right to certain money deposited in the Banks and other property and proceeded to dispose of it. Under the will the respondent was an executor and a beneficiary. In addition to this on 23rd January, 1940, Janikamma wrote two letters the one to the Andra Bank at Bandar, the other to the Kistna Co-operative Bank at Masulipatam, requesting that after her death all the fixed deposits standing in her name at the Bank in question should be given over to her nephew, the respondent, with certain further directions in regard to the principal and interest during her lifetime which need not be stated. These letters were given to the respondent for him to take to the Banks but before he did so Janikamma died. Before the Subordinate Judge there was much discussion concerning these letters, their authenticity being challenged by the appellant, and that learned Judge found that they had not in fact been written by Janikamma. The High Court came to a different conclusion and, if it were necessary for their Lordships to determine this matter, they would find it difficult to uphold the finding of the Subordinate Judge notwithstanding that he saw and heard the witnesses, for the reasons that he gives appear inadequate to

support the charge that the respondent had fabricated all or any part of the letters. But it is not necessary further to consider this matter, for, the issue being whether the respondent had a *bona fide* claim to the property in question, it is undeniable that he had, apart from the letters, a claim under the will which could only be displaced by the appellant if the latter could show that the property belonged to him, not to Janikamma. That this was an honest claim, which would support the agreement of compromise, appears to be indisputable. But it is at this point, as the High Court have in their Lordships' opinion correctly held, that the learned Subordinate Judge fell into error. For he said (and their Lordships repeat a passage cited by the High Court):

> " She is said to have made four wills : evidently these were not meant to be operative. The provisions contained in Ex. P-5 (that is the will in question) differ fundamentally from those in the letters. Thus it is clear that Ex. P-5 was not meant to be operative or enforceable."

Upon this the High Court observe that they are quite unable to follow the argument and add that the appellant's counsel had rightly not claimed that there was any force in it.

There was then no justification for holding as the learned trial Judge held that the agreement was without consideration, and this being so, their Lordships must conclude that the High Court, though the questions raised in the case were substantially questions of fact, were well justified in reversing his decision. For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for Appellant : *Lambert and White.*

Solicitors for Respondent : *R. L. Wilson & Co.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Thokkudubivyanu Immaniyelu and others .. *Petitioners.**

Limitation Act (IX of 1908), section 4—Vacation of High Court—Expiry during holidays of time for filing an application—Reopening of Court—Judicial work taken up on a later date—Application filed on that date—If within time.

The notification regarding the summer vacation of the High Court for the year 1942 prescribed that the Court would be closed from 28th April until the 4th July, both dates inclusive. The first day on which the Court was not closed but was open for receiving papers was 5th July, but the Judges actually sat for judicial work only from the 7th July. An application for which the prescribed period of limitation expired during the holidays was presented on 7th July instead of on 5th July. On a question whether it was in time,

Held, that the application was barred by limitation as having been presented out of time.

S.R. No. 22358 of 1947 review petition sought to be presented to the High Court for review of the judgment and decree of the High Court dated 24th January, 1947, and passed in Appeal Nos. 26 and 78 of 1945.

K. Bhimasankaram and *G. Venkatarama Sastri* for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

The Order of the Court was made by

The Chief Justice.—The sole question for consideration is whether a petition for review of the judgment in Appeal Suit Nos. 26 and 78 of 1945 was presented in time or beyond the period prescribed by the Limitation Act. The

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* S.R. No. 22358 of 1947 (Review Petition). 30th October, 1947.

judgment was delivered on the 25th January, 1947 and the limitation period during which the petition for review of it could be presented expired on or about the 22nd June, 1947. That date occurred during the period when this Court was in recess. The notification regarding the summer vacation in 1947 of this Court prescribed that the Court would be closed from the 28th April until the 4th July, 1947, both dates inclusive. The first day on which the Court was not closed, but was open, was Saturday the 5th July, when it is not in dispute, the office was open and plaints, appeals, petitions and other proceedings were presented and could have been presented. That was the first day on which the Court was open after the expiration by effluxion of time of the limitation period during which the petition for review in the present instance expired. The petition was not presented on the 5th July but on Monday, the 7th July. The question is, has it been presented within time or is the petition now barred by the provisions of the Limitation Act?

On behalf of the applicant-petitioner, it was contended that, although the office of this Court was open on the 5th July, there were no actual sittings, no judicial work was carried out and no Judges sat to adjudicate. Consequently, it was contended, that the Court was not open on the 5th July, and the first day on which it was open was the 7th July, when the Judges first sat to discharge judicial duties. It is manifest that the petition should have been presented on the first day when the Court was reopened after its recess. This is clear from section 4 of the Limitation Act which provides that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court reopens.

The proposition now before us has been settled by decisions of this Court. In *Nachiyappa Mudali* v. *Ayyasami Aiyar*[1], it was notified that a District and Sessions Court would be closed from Monday the 23rd May to Saturday the 23rd July, both days inclusive, but the notification proceeded, that the Court would be open at specified hours on Tuesdays and Fridays during the recess for the reception of plaints, petitions and other miscellaneous papers. There the period of limitation in respect of an appeal expired on the 1st July, when the Court was closed, and the appeal was presented on the 22nd July whilst the Court was still closed. Between the date of the expiration of the limitation period and the presentation of the appeal, the Court had been open on several days for the reception of plaints, petitions and other miscellaneous papers. It was held, by four of the five Judges, that the appeal was barred, that it should have been presented on the first day after the expiration of the limitation period when the Court was open for reception of appeals and other papers. That decision was followed in the *British India Steam Navigation Co., Ltd.* v. *Sharafally*[2], a decision of a Division Bench. It is manifest from the two decisions immediately referred to that on the days during the Court's recess, when the office was open for the reception of institutions, no Judge sat in the Court. Nevertheless the decision was to the effect as already stated.

In the present instance, there is no question of the Court being open on a day during which the Court was in recess. But the question is whether, when the Court reopened on the 5th July, it was the date when the petition in this instance should have been presented. It seems to me an *a fortiori* case in the light of the above two decisions that the petition should have been presented on the day the Court reopened. I say it is an *a fortiori* case inasmuch as, in the two decisions quoted, a petition which was presented during the Court's recess but on a day later than that when it should have been presented to the office when open for that purpose during the recess was held to be barred by limitation. During the argument, reference was made by learned counsel for the petitioner to two decisions reported in Short Notes of (1935) 69 M.L.J. 22 (C.M.P. No. 4070 of 1934, Stodart, J.) and Short Notes of (1936) 43 L.W. 58 (S.R. No. 633 of 1936, King, J.). Each decision was

1. (1882) I.L.R. 5 Mad. 189 (F.B.). 2. (1922) 44 M.L.J. 100 : I.L.R. 46 Mad. 938.

a single Judge. I do not think it necessary to say anything further than that I am unable to agree with those decisions which are in conflict with the earlier ones, to which reference has been previously made, and they cannot be taken as pronouncements which should be followed regarding the date when an appeal, petition or other proceeding can be instituted, during or at the conclusion of a recess of any Court.

In my opinion for the reasons given, the petition in this case was presented too late and is affected by the bar of limitation. The papers will be rejected and returned.

Satyanarayana Rao, J.—I agree.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

A. Moses Pillai .. *Appellant**

v.

M. K. Govindan .. *Respondent.*

Madras House Rent Control Order (1941), *clause* 7 (a)—*Scope and effect—Contract for the payment of rent before the coming into force of the order—Provision for payment of increased rent after one year—Madras House Rent Control Order coming into force in the meanwhile—Enforceability of the stipulation for higher rent.*

The language of clause 7 (*a*) of the Madras House Rent Control Order is peremptory and permits an increase in rent only where some addition, improvement or alteration such as is described in that clause has been carried out at the landlord's expense after the fixation of the rent. It does not permit an increase in any other case.

A rental agreement of 4th February, 1942, called a house rent chit, provided that the tenancy was in the first instance to last for one year and terminate on 3rd February, 1943, and during this period Rs. 40 per month was to be paid by the tenant by way of rent. The tenant was to deliver possession of the house to the landlord on 3rd February, 1943. Then followed a clause " If I (tenant) fail to deliver possession to you of the house within the prescribed period, I am from that date of such lapse bound to pay rent at the rate of Rs. 45 a month until possession is delivered to you (landlord)." In a suit by the landlord to recover the higher rate of rent, it was contended by the tenant that in view of clause 7 (*a*) of the Madras House Rent Control Order (which had been made applicable to the district in question from the 17th March, 1942), the stipulation for the payment of increased rent was unenforceable.

Held, that the provisions of clause 7 (*a*) of the order would apply even though the parties had contracted otherwise. The stipulation as to higher rent having been rendered invalid by reason of the statute it was open to the tenant to successfully maintain that notwithstanding his agreement he was entitled to the benefit of clause 7 (*a*) of the order and was liable to pay only at the rate obtaining prior to the coming into operation of the order.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in A.S. No. 337 of 1944 preferred against the decree of the Court of the District Munsiff, Coimbatore, in O.S. No. 767 of 1943.

J. S. Vedamanickam for Appellant.

T. R. Ramachandran for Respondent.

The Court delivered the following

JUDGMENT.—The appellant in this second appeal is the owner, and the respondent is the tenant, of a house in Coimbatore. The suit was for obtaining possession of the house and for the recovery of Rs. 70 as arrears of rent due till the date of the plaint. Out of this amount, Rs. 25 was said to be the balance of rent due for five months from 3rd February, 1943 to 3rd July, 1943 ; and Rs. 45 was claimed as the rent which was payable from 3rd July, 1943 to 3rd August, 1943. It was admitted in the plaint that from 3rd February, 1943 to 3rd July, 1943, the defendant paid at the rate of Rs. 40 per month ; but the plaintiff claimed that

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* S.A. No. 2067 of 1945. 22nd August, 1947.

he was entitled to Rs. 45 per month even for those 5 months and that was why he claimed Rs. 25 as the balance due in respect of that period. The learned District Munsiff of Coimbatore dismissed the suit. An appeal to the Subordinate Judge of Coimbatore was also unsuccessful. Hence, the present second appeal, which is confined to the claim for rent, the plaintiff conceding that the defendant cannot be evicted in view of the provisions of the Madras House Rent Control Order, 1941, which was made applicable to the district of Coimbatore from 17th March, 1942.

The defendant executed in favour of the plaintiff what is described as a house rent chit on 4th February, 1942, the principal terms of which are the following: The tenancy was in the first instance to last for one year and terminate on 3rd February, 1943. During this period Rs. 40 per month was to be paid by way of rent. The defendant was to deliver possession of the house to the plaintiff on 3rd February, 1943. Then occurs the following sentence, on which considerable reliance is placed on behalf of the plaintiff:

> "If I fail to deliver possession to you of the house within the prescribed period, I am from the date of such lapse bound to pay rent at the rate of Rs. 45 a month until possession is delivered to you."

It is common ground that by this clause the defendant agreed to pay rent at the rate of Rs. 45 per month after 3rd February, 1945.

As already stated rent was paid at the rate of Rs. 40 per month for five months from 3rd February to 3rd July, 1943. The learned District Munsiff held that rent at that rate was accepted by the plaintiff without protest. But as no finding was given by the learned Subordinate Judge I called for a finding from him as to whether the receipt of Rs. 40 per month by the plaintiff was on protest or without protest. The learned Subordinate Judge has now returned a finding that the plaintiff received these amounts on protest. This, being a finding of fact, is not challengeable in second appeal.

It is, however, argued by Mr. T. R. Ramachandran, counsel for the defendant-respondent, that the stipulation which I have set above, is unenforceable in view of clause 7 (*a*) of the Madras House Rent Control Order, 1941, which runs as follows:

> "After the commencement of this order, an increase in rent shall be permissible only where some addition, improvement or alteration, not included in necessary repairs or repairs which are usually made to houses in the local area, has been carried out at the landlord's expense since the rent was fixed."

The language of clause 7 (*a*) is peremptory and permits an increase in rent only where some addition, improvement or alteration such as is described in that clause has been carried out at the landlord's expense after the fixation of rent. It does not permit an increase in any other case. The stipulation as to the payment of rent of Rs. 45 per month could, under the rent chit came into operation only after 3rd February, 1943, by which time the Madras House Rent Control Order was in operation in Coimbatore. In support of his argument, that the crucial date for the purpose of clause 7 (*a*) is when the stipulation as to increase of rent comes into actual operation and not the date of the agreement itself, Mr. Ramachandran relied upon the decision of the Court of Appeal in *Goldsmith* v. *Orr*[1]. Dealing with section 4 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, Bankes, L.J. and Scrutton, L.J. (Warrington, L.J., dissenting) held that rent is increased within the meaning of that section at the date when the increase became effective, and not at any earlier date at which an increase has been agreed upon between landlord and tenant. Mr. J. S. Vedamanickam, counsel for the appellant, attempted to distinguish this case on the ground that the English statute contains the words "Notwithstanding any agreement to the contrary" and that there are no similar words in clause 7 (*a*) of the Madras House Rent Control Order of 1941. This argument I am unable to accept. Even without the use of those

1. 89 L.J. K.B.D. 901.

words, the Legislature can indicate that its provisions shall apply notwithstanding that the parties contracted otherwise and in my opinion, there is such an indication in clause 7 (*a*). The clause allows an increase only in one contingency which of course does not apply to the case before me. The obvious conclusion to draw from the language of clause 7 (*a*) is that the Legislature was intending to interfere with rights created by contracts entered into before or after the order and that on grounds of high policy it would prohibit any increase of rent save in the only case for which provision is made in the rest of the clause.

In *Chandu* v. *Sankaran*[1], Leach, C.J. and Krishnaswami Ayyangar, J., had occasion to deal with the language of section 20 of the Malabar Tenancy Act which in several respects is similar to the language of section 7 (*a*) of the Madras House Rent Control Order, 1941. Section 20 of the Malabar Tenancy Act provides that

"no suit for eviction of a customary verumpattamdar, kuzhikanamdar, or kanamdar shall lie at the instance of his landlord except on the following grounds"

and then follows an enumeration of those grounds. One of the arguments addressed in that case was that since the words "notwithstanding any contract to the contrary" did not occur in section 20, the contracts which were entered into before the commencement of the Malabar Tenancy Act must be taken to have been saved. This argument was rejected and the learned Judges pointed out that the language used by the Legislature was sufficient to express its intention to nullify contracts previously entered into. They described the language employed in section 20 of the Malabar Tenancy Act "as plain and peremptory".—a description which seems to me to be quite appropriate and applicable to clause 7 (*a*) of the Madras House Rent Control Order. There is no particular formula or set language which the Legislature has to use in order to indicate that it intends to interfere with the contractual rights of parties. It is true that in several statutes the words suggested by Mr. Vedamanickam find a place. It cannot, however, be said that other language equally effective and equally clear cannot be employed for expressing the same intention.

The appellant's counsel next referred to certain observations of the Divisional Court in *Wilcock* v. *Booth*[2], where Bray, J., observed as follows :

"In construing these emergency statutes, regard must, of course, as in other statutes, first be had to the plain meaning of the statutes themselves as a matter of construction, but we think that, restricting as they did, the ordinary rights of individuals arising from their mutual contracts and relationships, the Acts should not be needlessly extended beyond the particular mischief which they are designed to avoid or remedy."

The learned Judges were, in that case, dealing with section 1, sub-section 1 (*c*) of the Increase Rent (Amendment) Act, 1919. Under that provision, it was obligatory on the part of a landlord seeking the eviction of his tenant to offer alternative house accommodation. It was argued that where the premises previously occupied consisted of a dwelling house and a shop the landlord was under an obligation to offer alternative house accommodation and alternative shop accommodation and that it was not sufficient if he offered alternative house accommodation only. The observations I have set out above were made in rejecting that argument. I do not consider the decision in *Wilcock* v. *Booth*[2] or the observation in it as throwing any light on the question now at issue, as, in my opinion the language of clause 7 (*a*) of the Madras House Rent Control Order, 1941, is quite clear and unambiguous.

The decision in *Baulchandra Chakravarthi* v. *Nistarini Debi*[3] cited on behalf of the appellant turned on the provisions of the Bengal Tenancy Act of 1885, and lays down no principle which can be invoked in the present context.

Mr. Vedamanickam then argued that when there is a single contract providing for a certain rate of rent during a specified period and a higher rate of rent thereafter, it is not permissible to treat the former part as valid and the latter as invalid.

1. (1941) 1 M.L.J. 573.
2. 89 L.J.K.B. 864 at 866.
3. (1905) I.L.R. 33 Cal. 136.

It is quite true that if the matter rested in contract merely, it will not be permissible for a party to a contract to claim that a certain portion of it is invalid while the rest of it is valid since every part of the contract must be regarded as consideration for every other part. But here we have the Legislature saying in unequivocal language that in contracts providing for rent it is not open to parties to stipulate for any rent higher than what was being collected prior to the coming into operation of the Madras House Rent Control Order, 1941. The invalidity of the stipulation as to the higher rate of rent arises by reason of the statute. In these circumstances I do not see why the defendant cannot contend that notwithstanding that he had agreed to pay rent at the rate of Rs. 45 per month after 3rd February, 1943, he is entitled to the benefit of clause 7 (*a*) of the Madras House Rent Control Order, and that he is consequently liable to pay only at the rate obtaining prior to the coming into operation of the order.

The plaintiff cannot, therefore, sustain his claim for the larger rent and the second appeal is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE GOVINDA MENON.

Kapavarapu Venkata Achyuta Rao and another .. *Appellants**

v.

Kapavarapu Srinivasaswami and another .. *Respondents.*

Receiver—Grounds for appointment of—Suit for partition of definite share in suit properties and mesne profits—Defendant chronically indebted and addicted to violent drinking.

Where in a suit for partition of their one-third share of the suit properties and for mesne profits under the terms of an agreement the plaintiffs allege and prove that the defendant is a person chronically indebted and is addicted to violent drinking and has been embarking upon a career of extravagance and waste, it is a fit case for the exercise of a judicial discretion in favour of the appointment of a receiver for the properties in the suit.

Appeal against the order of the Court of the Subordinate Judge of Chicacole, dated the 25th day of March, 1947, and made in I.A. No. 284 of 1946 in O.S. No. 61 of 1944.

Y. Suryanarayana for Appellants.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal against the order of the learned Subordinate Judge of Chicacole appointing a receiver for managing the properties involved in O.S. No. 61 of 1944 on his file. The appellants in this Court are the first and second defendants in the suit. The third and fourth defendants are alienees of small portions of the property involved in the suit from defendants 1 and 2. The fifth defendant is the Rani of Jaggampet who had advanced money to the first and second defendants for the purpose of fighting litigation with the Provincial Government regarding the title to the property sought to be partitioned. The plaintiffs are a brother and sister, the children of the half brother of the first and second defendants. The properties which are the subject-matter of this suit belonged to one Kapavarapu Papamma who died some years ago. As there were doubts as to whether her adopted son's descendants, the plaintiffs and defendants 1 and 2 were reversioners under the Hindu Law to her property, the Government took possession of the same on escheat. From the evidence it is clear that the first and second defendants approached the fifth defendant to help them in fighting the litigation against the Government for establishing their title to the suit property.

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* A.A.O. No. 194 of 1947. 21st October, 1947.

It is unnecessary to deal at great length with this litigation. Suffice it to say that by the decision of this Court in 1941 it was declared that defendants 1 and 2 were the reversioners to the estate of Papamma. As a result of that decree, defendants 1 and 2 were put in possession of the property and a sum of Rs. 22,000 and odd was given to them as mesne profits and costs.

Now, the fifth defendant had entered into an agreement dated 17th October, 1936, whereby it was agreed that in addition to the re-payment of the sum of Rs. 12,000 advanced by her for meeting the expenses of the litigation, defendants 1 and 2 should give one-third of the share of the properties which they expected to get as a result of the suit to the plaintiffs who are their nephew and niece. According to the Hindu Law, since the half-brother of defendants 1 and 2, the father of the plaintiffs, died before Papamma, they are not entitled to any share in the properties. Probably *ex gratia* the fifth defendant wanted to help these destitute people as a consideration for her advancing this sum of money. It has also to be mentioned that the fifth defendant was appointed trustee for this one-third share of the properties the plaintiffs being the beneficiaries thereof. The fifth defendant assigned that right under the agreement to the plaintiffs, and the plaintiffs brought O.S. No. 61 of 1944 for a partition of their one-third share of the properties and for mesne profits. Some time after the filing of the suit an application for the appointment of a receiver was also filed.

The first defendant is a lunatic and is represented by a guardian. The second defendant is the younger brother of the first defendant and has been assailed in the plaint and also in the affidavit in support of the application, as a person who has wasted property incurring, large sums of money as debts. It is significant to note that in paragraph 18 of the affidavit for the appointment of a receiver it is stated that the second defendant spends on an average Rs. 15 per day on his drink alone. This statement is not categorically and specifically denied in the counter-affidavit at all except in a most general way. There are vaious allegations in the affidavit in support of the application wherein it is stated that the second defendant has borrowed large sums of money, he having borrowed sums from Kabuli money-lenders as well. A perusal of that affidavit shows that the second defendant is a person who is chronically indebted. The answers to these allegations contained in the counter-affidavit of the second defendant are certainly not satisfactory. They are evasive and the various answers are not to the point in answering the allegations.

When the suit itself came on for final hearing on the 25th March, 1947, as a part-heard suit—since some evidence had been already recorded before—defendants 1 and 2 were absent. Their counsel reported no instructions. So they were declared *ex parte*. Further evidence was taken on behalf of the plaintiffs and the learned Judge passed an *ex parte* decree in accordance with the prayer in the plaint as is found from his judgment. The application for the appointment of a Receiver also came on for final hearing on the same date. The learned Judge in a short order has appointed a receiver and given some directions as regards future management of the property. The reasons given by the learned Judge are that the second defendant has been embarking upon a career of extravagance and waste and unless that is checked the plaintiffs will not be able to realise anything under the decree that they may obtain in the suit. It is also stated that there is every likelihood of their being involved in interminable litigation. Evidence was adduced before the learned Judge that even after the filing of the application for the appointment of a Receiver the second defendant had been borrowing monies. On these grounds he exercised the discretion vested in him judicially and held that it is just and convenient to appoint a receiver in the circumstances of the case.

Mr. Y. Suryanarayana for the appellants contends that the learned Judge ought not to have appointed a receiver as regards the two-third share of the properties because, according to him, the subject-matter of the litigation is only one-third of the properties and even if the plaintiffs succeed, they would get no rights as regards the two-thirds. He also contends that the parties are tenants-in-common and

there is no question of joint family involved in this case. His argument leads to this; that in a suit in which a tenant-in-common asks for his share of the properties alleging waste and damage against the other tenants-in-common no receiver can be appointed; for in all such suits where a tenant-in-common claims his share, there will be remaining shares left for the defendants tenants-in-common which cannot be interfered with by being taken into the custody of the Court. In my opinion such an argument is untenable and cannot be accepted. The course of this litigation and the way in which the second defendant has been conducting himself all these years are proof positive that if there is any case in which a judicial discretion has been wisely exercised it is this. Having gone through the affidavit and counter-affidavit and also the plaint and written statement in this case, I see no reason to differ from the learned Judge who has considered all the matters before him and come to this conclusion. The appeal is accordingly dismissed with costs.

The Chief Justice.—I agree and have nothing to add.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE GOVINDA MENON.

Revur Venkatasubba Rao and others .. *Appellants**

v.

Gurijala Venkataramanayya and others .. *Respondents.*

Executing Court—Powers—Cannot go behind decree passed with jurisdiction—Compromise to which only some of the defendants were parties—Decree in terms of—Execution—Other defendants who were not parties to the compromise—If can treat the decree as nullity.

Where a Court having jurisdiction passes a decree in terms of a compromise to which only some of the defendants were parties, the other persons who were not parties to the decree cannot in proceedings for execution of the decree claim that the decree is a nullity. The decree is binding on all persons unless and until set aside by appropriate proceedings. Its validity cannot be challenged in execution proceedings, in which proceedings a Court can only construe and enforce a decree but cannot consider its merits and validity.

Girish Chunder Lahiri v. *Shoshi Shikhareswar Roy*, (1900) L.R. 27 I.A. 110 : I.L.R. 27 Cal. 95 (P.C.); *Kalipada Sarkar* v. *Hari Mohan Dalal*, (1916) I.L.R. 44 Cal. 627 and *Jnanendra Mohan Bhaduri* v. *Rabindranath Chakarabarti*, (1932) 64 M.L.J. 341 : L.R. 60 I.A. 71 : I.L.R. 60 Cal. 670 (P.C.), discussed.

Sankaravadivammal v. *Kumarasamayya*, (1885) I.L.R. 8 Mad. 473 and *Abdul Karim* v. *Meherunnissa*, (1918) 45 I.C. 33, dissented from.

Appeal against the order of the District Court of Nellore in E.A. No. 77 of 1943 in O.S. No. 64 of 1936 dated 2nd October, 1945.

K. Krishnamurthi for Appellants.

K. Subba Rao and *T. Venkatadri* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appeal relates to a sum of Rs. 2,180-0-10 deposited in Court to the credit of O.S. No. 64 of 1936 on the file of the District Court of Nellore; originally it was credited to O.S. No. 28 of 1922 on the file of the Subordinate Judge's Court; by virtue of various proceedings it was transferred to the credit of other suits and is now credited as previously stated. Throughout its various transfers its nature and the parties entitled to it have not altered.

O.S. No. 28 of 1922 was a mortgage suit, the hypotheca being 67 acres 53 cents of land, of which 53 acres 62 cents were cultivated. In respect of Fasli year 1338 the total proceeds from the crops raised on the cultivated portion of the hypotheca were paid into Court; this was some time after the year 1928; out of those proceeds the mortgagee-decree-holders have been paid all the sums

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* A.A.O. No. 131 of 1946. 21st October, 1947.

to which they were entitled and, it is beyond doubt, the cultivators of the 53 acres 62 cents are entitled to the balance, namely, the above sum of Rs. 2,180-0-10, to which the mortgagees assert no claim. The cultivators form three groups of persons: respondents 1 to 3, the petitioners in the Court below, they cultivated 18 acres 12 cents of the total cultivation of 53 acres 62 cents; the appellants, respondents 12, 14 to 16, 18 to 20 and 22 to 25 in the Court below, they cultivated 5/6ths of the remaining 35 acres 50 cents of the total cultivation; and respondents Nos. 4, 6, 8, 9, 11 and 12, respondents 17, 26, 28, 29, 31 and 32 in the lower Court (hereinafter called " the other respondents "), they cultivated the remaining 1/6th of the 35 acres 50 cents. All other parties in the Court below and in this appeal can be ignored.

By application E.A. No. 77 of 1943 in O.S. No. 64 of 1946, out of which this appeal arises, respondents 1 to 3 sought an order of Court that, out of the sum of Rs. 2,180-0-10, the amount of Rs. 1,600 be paid to them and that the balance of Rs. 580-0-10 be retained to meet any liability in O.S. No. 176 of 1926 on the file of the District Munsiff's Court, Nellore, in which suit the decree-holder had obtained an order for attachment of the money in Court to the extent of Rs. 580-0-10.

The learned District Judge, against whose decision this appeal is preferred, by his order directed that: the respondents 1 to 3 be permitted to withdraw one half of the available sum without security, namely, if the attachment had been raised, one half of Rs. 2,180-0-10; if it had not been raised, then, one half of Rs. 1,600; in regard to the other moiety, respondents 1-3 could withdraw it upon furnishing security and undertaking to make good the amount in the event of the contesting respondents (the appellants and the other respondents in this appeal) being entitled to claim that moiety; as regards the appellants and the other respondents, they were referred to appropriate proceedings to set aside the decree in O.S. No. 64 of 1936 (to which reference hereafter will be made). It was in respect of such potential proceedings that the order for security was made regarding one moiety of the available money in Court if withdrawn by respondents 1-3.

The appellants challenge the correctness of the learned District Judge's order in the following ways:

1. The decree in O.S. No. 64 of 1936 is not binding upon them, they are entitled to treat it as a nullity and it should have been ignored by the learned Judge.

2. In O.S. No. 176 of 1926 respondents 1-3 are the judgment-debtors, the decree is not against the appellants or the other respondents, and the amount of the attachment of Rs. 580-0-10 should have been deducted from the sum to which respondents 1-3 are entitled out of the money in Court and should not be deducted from the total sum of Rs. 2,180-0-10.

3. In any event respondents 1-3 having cultivated only 18 acres 12 cents of the 53 acres 62 cents, they are not entitled to one half of the whole cultivation proceeds but only to the proportion represented by their cultivation, namely, Rs. 740 (approximately) from which sum the amount of the attachment of Rs. 580-0-10 should be deducted, if occasion arises.

The other respondents have not preferred an appeal against the order of the learned District Judge, but, through learned counsel, they support the appellants' appeal and rely upon Order 41, rules 4 and 33 of the Code.

During the period of about 20 years in which the proceeds from the crops, harvested in Fasli year 1338, have been in Court, of which the sum of Rs. 2,180-0-10, now remains, there have been several suits and proceedings relating to that sum. It is unnecessary to set out all those pieces of litigation but to refer only to O.S. No. 64 of 1936 abovementioned. But before doing this, it is convenient to record that there is no dispute as to the respective areas which the three groups of parties

cultivated, that the decree for Rs. 580-0-10 in O.S. No. 176 of 1926 was obtained against respondents 1-3, the appellants and the other respondents are in no way concerned with that decree and that the attachment against the money in Court solely affects the amount to which respondents 1-3 are entitled.

O.S. No. 64 of 1936 was a suit in which the mortgagee-decree-holders in O.S. No. 28 of 1922 were the plaintiffs; the present appellants, respondents 1-3, the other respondents or the predecessors-in-interest of some or all of them, *inter alia*, were the defendants; other defendants to the suit can be ignored. The claims made were for a declaration that the plaintiffs were entitled to the sum of Rs. 2,180-0-10, the subject-matter of the present appeal (then deposited to the credit of O.S. No. 40 of 1929 on the file of the Subordinate Judge's Court, Nellore) and for a permanent injunction restraining the defendants from withdrawing the same. The plaintiffs and respondents 1-3 (who were defendants 1-4 in the suit there being one other person then associated with them, who can now be ignored) appeared in the suit; the present appellants and the other respondents were *ex parte*; as also were the remaining defendants, some of whom died *pendente lite*. On the suit coming for disposal on November 3rd, 1937, the plaintiffs and respondents 1-3 (therein described as defendants 1-4) filed a deed of compromise and presented an application praying that a decree be passed in accordance with its terms as between the plaintiff, respondents 1-3 and against all the *ex parte* defendants. In pursuance thereof, the Court ordered and decreed, *inter alia*, that the amount of Rs. 2,180-0-10 to the credit of O.S. No. 40 of 1929, which represented the balance of the sale proceeds of the crops of the hypotheca raised in the Fasli 1338, be sent for as the property of respondents 1-3 and be kept in deposit to the credit of that suit (O.S. No. 64 of 1936); the question whether the deposit amount could be drawn by respondents 1-3 should be determined in execution proceedings (therein specified); and until that question were finally determined the amount thereof should not be drawn by respondents 1-3.

The application, out of which this appeal arises, was made by respondents 1-3, relying upon the terms of the decree in O.S. No. 64 of 1936, and it is an application in execution of that decree. The appellants, supported by the other respondents, contended that, since the decree was passed pursuant to a compromise between the plaintiffs and respondents 1-3 and since the appellants and the other respondents were not parties to the compromise decree, it is not binding upon them but only upon the parties thereto; the decree was passed without jurisdiction, it is a nullity and it can be ignored by the appellants and the other respondents; consequently, it does not entitle the respondents 1-3 to the whole sum of Rs. 2,180-0-10 and it does not prevent an order being made for payment out to the appellants and to the other respondents of their respective shares of the money in Court, to which they are entitled. On behalf of the respondents 1-3 Mr. Subba Rao argued that, however wrong or incorrect it might have been for the decree to have been passed against the appellants and the other respondents upon the compromise effected between the plaintiffs and respondents 1-3, nevertheless it is a decree which prevents an order for payment out of Court being made in their favour; no appeal was preferred against this decree, it is final and conclusive, the Court which made the decree had jurisdiction in that behalf, it is not a nullity; and unless and until set aside by appropriate proceedings it is binding upon the appellants and the other respondents.

In support of his contention that the decree is a nullity Mr. Krishnamurthi, for the appellants, cited *Sankaravadivammal* v. *Kumarasamayya*[1] and *Abdul Karim* v. *Meherunnissa*[2]. In *Sankaravadivammal's case*[1] a decree was passed upon a compromise in a partition suit to which the seventh defendant was not a party; in execution of the decree she was dispossessed of certain property; she presented a petition objecting that the decree could not bind her and praying that delivery of possession of the

1. (1885) I.L.R. 8 Mad. 473. 2. (1918) 45 I.C. 33.

property by an amin might be cancelled ; her petition was rejected by the Subordinate Judge, as also her appeal therefrom to the District Judge ; in the High Court the actual decision was that she was entitled to appeal against the order rejecting her petition and it was remanded to the Subordinate Judge for disposal ; at page 475 of his judgment Hutchins, J., observed that

> " The compromise behind her back cannot possibly affect her position, nor can the decree which on its face has no basis beyond an agreement between other parties. The decree is a nullity."

In *Abdul Karim's case*[1] a raiyati holding was sold to a stranger in execution of a decree for rent ; out of the proceeds the decree was satisfied and the balance was paid to the judgment-debtors ; thereafter, the mortgagee of the holding, who had previously obtained a mortgage decree and had purchased the holding in execution of that decree, applied to have the sale in execution of the rent decree set aside ; the mortgagee and the auction purchaser effected a compromise upon the terms of which an order was made, including a direction that the mortgagee was at liberty to recover the balance of the sale proceeds from the judgment-debtors who were not parties to the compromise ; an application in execution to enforce the order was allowed, on appeal, by the District Judge ; on appeal to the High Court it was observed, at page 34 of the judgment, that there was no jurisdiction to make the order and no jurisdiction to enforce it and the order of the District Judge was set aside.

Each of the above decisions was given in proceedings in execution. It has been laid down by a long series of authorities that a Court executing a decree cannot go behind it. In *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*[2], it was observed by the Judicial Committee at page 967 of the judgment, that "in execution proceedings we are only construing the decree and not considering its merits". There are numerous decisions to the same effect, but reference to one of them alone is necessary, *Kalipada Sarkar* v. *Hari Mohan Dalal*[3], in which a large number of the decisions were reviewed and discussed. There, a decree was passed against a lunatic represented by a next friend who was a minor and, consequently, incompetent to act as next friend ; the lunatic having died, execution of the decree was sought against the lunatic's assets in the hands of his son ; at page 637 of the report it was pointed out that, whilst such a decree could be attacked by way of an application for review to the Court which made it, by way of an appeal or application for review to a superior tribunal or by way of a regular suit, nevertheless, the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made ; after referring to *Girish Chunder's case*[2], and to other decisions at page 632, it was observed, at page 638,

> "that every order or judgment however erroneous, is, in the words of Lord Cottenham in *Chuck* v. *Cremer*[4], good until discharged or declared inoperative and that the executing Court cannot enquire into the validity or propriety of the decree."

Apart from the position existing when a Court passes a decree against a dead person, which does not arise in the present instance and needs no consideration, the principle of law, to which reference has just been made, is subject to an exception. It is that, when a decree is passed by a Court which has no jurisdiction to make it, the decree is a nullity and it is incapable of execution. That was so held by their Lordships of the Judicial Committee in *Jnanendra Mohan Bhaduri* v. *Rabindranath Chakarabarti*[5], there an award in arbitration was filed in Court ; pursuant to section 15 of the Indian Arbitration Act, 1899, the Court purported to pass a decree upon the award, which it had no jurisdiction to do, since that section provided only that on being filed, an award should be enforceable as if it were a decree (section 17 of the Indian Arbitration Act, 1940, now enables such a decree to be passed).

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1. (1918) 45 I.C. 33.
2. (1900) L.R. 27 I.A. 110 : I.L.R. 27 Cal. 951 (P.C.).
3. (1916) I.L.R. 44 Cal. 627.
4. (1846) 2 Phil. 113 at 115.
5. (1932) 64 M.L.J. 341 : L.R. 60 I.A. 71 : I.L.R. 60 Cal. 670 (P.C.).

Returning to the matters in the present appeal, the District Court of Nellore, unlike the Court in the last cited authority, undoubtedly had jurisdiction to pass a decree in O.S. No. 64 of 1936 and, indeed, to pass a decree on the terms of a compromise between the parties. The decree which it did make, indubitably, is one which is binding upon the parties to the compromise.

Although the appellants and the other respondents were not parties to the compromise, nevertheless the Court had jurisdiction to make the decree and it is not invalid for want of jurisdiction; it is binding on all persons against whom it was made unless and until set aside by appropriate proceedings. Its validity cannot be challenged in execution proceedings, in which proceedings a Court can only construe and enforce a decree, it cannot consider its merits and validity. With respect I am unable to agree with the observations expressed in *Sankaravadivammal's*[1] and *Abdul Karim's cases*[2]; they are at variance with the decisions by which I am bound or, with which I agree. In my opinion the learned District Judge was correct in holding that, unless the order and decree in O.S. No. 64 of 1936 be set aside, the appellants and the other respondents have no right to any portion of the money in Court.

In other respects, I am unable to agree with the order of the learned District Judge. Since respondents 1-3 did not cultivate one half of the 53 acres 62 cents but only 18 acres 12 cents of that area and since those respondents were the sole judgment-debtors in the decree in O.S. No. 176 of 1926, the order was wrong regarding the amounts allocated to respondents 1-3, and the sums to be withdrawn with or without security, by them. The amount of that share is a sum ascertained by calculating the proportion which the area cultivated by them bears to the whole cultivation area, namely, 18/53rds (approximately) of Rs. 2,180. From the sum so ascertained, the amount of the attachment if not raised, should be deducted and respondents 1-3 should withdraw the resulting balance without security or, if the attachment has been raised, the whole of the amount ascertained as above; security should be furnished for any withdrawal in excess of either of those two amounts, whichever it be.

The order appealed from will be varied in the above respects and the respondents 1-3 will repay into Court any sums overdrawn by them, ascertained as above, for which security has not been given or they will furnish security for such excess withdrawal forthwith upon order so to do given by the lower Court. That order is subject to this further direction; if proceedings, which the appellants and the other respondents can take, to have the decree in O.S. No. 64 of 1936, set aside are now barred by limitation (upon which no opinion is expressed), in that circumstance, no order will be made upon respondents 1-3 regarding repayment of, or furnishing additional security for, money withdrawn by them from Court.

Whilst the other respondents have not preferred an appeal, the facts and circumstances in this appeal fall within Order 41, rules 4 and 33 of the Code and those provisions should apply. It follows that the proportions of the money in Court attributable to the appellants will be 5/6th and to the other respondents 1/6th of cultivated area of 35 acres 50 cents out of the whole cultivation of 53 acres 62 cents.

The appeal has failed in part but has succeeded in other respects. In my view the proper order for costs is that the parties respectively bear their own.

Govinda Menon, J.—I agree.

K.S. *Order varied and appeal allowed.*

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1. (1885) I.L.R. 8 Mad. 473.
2. (1918) 45 I.C. 33.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE GOVINDA MENON.

K. Rangachariar .. *Appellant**

v.

The Trinity Bank, Ltd., Trichinopoly and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 47, *Order* 21, *rule* 66 *and Order* 43, *rule* 1—*Order settling proclamation of sale—Administrative order—Appealability.*

The settlement of a proclamation of sale and its terms by the Judge is not the adjudication of any right but is merely an administrative order and consequently there is no right of appeal from such an order.

Sivagami Achi v. *Subramania Iyer,* (1903) 14 M.L.J. 57 : I.L.R. 27 Mad. 259 (F.B.), followed.

Order 43, rule 1, Civil Procedure Code does not include in its provisions an order settling the proclamation of sale.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly dated 12th November, 1945, in E. P. No. 349 of 1945 in O. S. No. 98 of 1944.

N. Panchapakesa Aiyar for Appellant.

S. Thyagaraja Aiyar and *A. V. Narayanaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a mortgage suit in which a decree for sale was passed. The mortgaged properties were three items of which, so far as material item No. 1 became vested in the 12th defendant to the suit, the second respondent in this appeal and items 2 and 3 were vested in the sixth defendant to the suit and the appellant in this appeal, the first respondent here being the mortgagee. The learned Additional Subordinate Judge of Trichinopoly settled the proclamation of sale, one of the terms being items 2 and 3 should be sold prior to item 1 of the three pieces of hypotheca. This is an appeal by the sixth defendant in the suit against the direction by the learned Additional Subordinate Judge for items 2 and 3 to be auctioned prior to item 1.

At the outset, learned counsel on behalf of the second respondent, the 12th defendant in the suit, took a preliminary objection against the maintainability of the present appeal. He placed his objection on three grounds : (1) that Order 43 rule 1 of the Code does not include an order, as was made when the proclamation of sale was settled, as one which is subject to appeal by virtue of that rule ; (2) that the question arising in the appeal is a dispute as between two judgment-debtors and not one arising as between the decree-holder and the judgment-debtor, consequently it is not subject to the provisions of section 47 of the Code and cannot be made the subject of an appeal ; and (3) that the settlement of the proclamation of sale and its terms by the lower Court was not an adjudication of any right but was merely an administrative order and not a judicial one and therefore there is no right of appeal.

It is convenient to deal, in the first instance, with the third objection. This has been the subject of pronouncement by a Full Bench of this Court in *Sivagami Achi* v. *Subramania Iyer*[1]. That decision was given under the Code of Civil Procedure of 1882, in which secs. 244 and 287 correspond respectively to section 47 and O. 21, rule 66 of Code of 1908. It was held that proceedings under section 287 were administrative and not judicial and that no appeal lay from an order made under it pursuant to section 244. *Lanka Rama Naidu* v. *Lanka Ramakrishna Naidu*[2], is a decision by a Division Bench of this Court after the Code of 1908 had come into force. In the judgment, the opimion is expressed that O. 21, rule 66 corresponds, so far as may be, to the provisions of section 287 of the older Code and

* A. A. O. No. 11 of 1946. 14th October, 1947.

1. (1903) 14 M.L.J. 57 : I.L.R. 27 Mad. 259 (F.B.).

2. (1923) 46 M.L.J. 192.

although the phraseology of the new provision is not entirely in accord with the wording of the latter section, nevertheless the effect is the same and that there is no difference in principle regarding the provisions of the two Codes. It was held that a Judge acts not judicially, but merely adminstratively, when he settles a sale proclamation, and, it would follow there is no appeal from the settlement of such a proclamation. In the course of argument before us, learned counsel for the appellant did not seek to criticise the correctness of the last mentioned decision, in so far as it relates to the analogy between the provisions of the Codes of 1882, and 1908. In *Venkataseshayya* v. *Ramaraju*[1], Pandrang Rao J., sitting alone, expressed the opinion in accordance with the previous two decisions regarding the nature of an order settling a sale proclamation, that it is an administrative order and no appeal lies therefrom.

We are bound by the decision of the Full Bench of this Court in *Sivagami Achi* v. *Subramania Iyer*[2], unless it can be shown that it is distinguishable in so far as the present appeal is concerned. It has not been so shown, and it must follow, in my opinion, the order by which the learned Additional Subordinate Judge of Trichinopoly settled a proclmation of sale, was an administrative order from which no appeal can lie and that the preliminary objection raised by the learned counsel for the respondent must prevail.

In regard to the other two grounds of objection, so far as the first one is concerned, it was not challenged in argument by the learned counsel for the appellant that O. 43, rule 1 does not include in its provisions, an order against which the present appeal is made. So far as the second objection raised by learned counsel for the respondent is concerned, there is a conflict between decisions in this Court. *Bapanna Garu* v. *Jaggarao Garu*[3], and *Anavarasada Khan Pani Sahib* v. *Misiri Khan Pani Sahib*[4], are decisions to the effect that disputes as between co-judgment-debtors or co-decree-holders are not covered by section 47 and consequently no appeal from any order relating to such disputes lies. Those decisions appear to be in conflict with *Vedaviasa Iyer* v. *The Madura Hindu Labhá Nidhi Ltd*[5]. In light of the conclusion expressed that the third objection to the present appeal must prevail, it is unnecessary to discuss and consider the above conflicting decisions or to refer the subject matter of the conflict for the consideration of a Full Bench.

In my opinion, this appeal must be dismissed with costs, one set for each respondent. The first respondent may add the amount of his costs to the decretal debt in the mortgage suit.

Govinda Menon, J. :—I agree.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

Shaik Abdul Nabhi Saheb .. *Appellant**

v.

Marti Ramalakshmammah .. *Respondent.*

Letters Patent (Madras) clause 15—Interlocutory order in second appeal staying proceedings in lower Court till disposal of second appeal—If "judgment" against which Letters Patent Appeal lies.

An order on an interlocutory application in a second appeal granting stay of proceedings in the lower Court till disposal of the second appeal is a "judgment" within the contemplation of clause 15 of the Letters Patent (Madras) against which an appeal lies.

Tuljaram v. *Alagappa Chettiar*, (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.), relied on.

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1. A.I.R. 1935 Mad. 714.
2. (1903) 14 M.L.J. 57: I.L.R. 27 Mad. 259 (F.B.).
3. (1943) 1 M.L.J. 271.
4. (1916) 31 M.L.J. 44.
5. (1923) 45 M.L.J. 478.

* L. P. A. No. 20 of 1947. 14th November, 1947.

Appeal under clause 15 of the Letters Patent against the order of Rajamannar, J., dated 23rd April, 1947 and made in C.M.P. No. 2101 of 1947 (petition for stay of trial of O.S. No. 834 of 1945, District Munsiff Court (Additional) Guntur pending A.A.O. No. 162 of 1947 on the file of the High Court) in A.A. O. No. 162 of 1947, preferred to the High Court against the order, dated 31st January, 1947 in A.S. No. 272 of 1946 on the file of the Court of the Subordinate Judge of Guntur (O.S. No. 834 of 1945, District Munsiff Court, Guntur).

G. Venkatarama Sastri for Appellant.

V. Rangachari for Respondent.

The Court delivered the following

JUDGMENT : *The Chief Justice.*—This is an appeal by leave from the decision of Rajamannar, J., pursuant to clause 15 of the Letters Patent of this Court.

The relevant facts can shortly be stated. The plaintiff, appellant here, instituted a suit in the Court of the District Munsiff of Guntur. At the trial, it was dismissed as being not maintainable on some preliminary objection, the merits not having been considered. That dismissal was set aside upon appeal by the plaintiff to the learned Subordinate Judge of Guntur who, on the 31st January, 1947, directed the suit to be remanded for disposal by the learned District Munsiff. Shortly thereafter, the 7th defendant, respondent before us, preferred an application for review to the learned Subordinate Judge. The grounds of review manifest clearly and unequivocally that the application was for the purpose of setting aside the whole of the previous order and decree of the Subordinate Judge directing the suit to be tried. No other relief is found to be contained in the application. It was disposed of by the learned Subordinate Judge on the 31st March, 1947, when the previous order or decree remanding the suit for trial was not interfered with ; but the learned Judge directed two very minor and, I would have thought, entirely unnecessary textual alterations to the wording of the former decree. In place of the words " is entitled to " he directed the word " can " to be substituted and the words " and in the light of the observations contained herein " to be deleted from paragraph 8 of his judgment.

In regard to the first alteration, the new wording, it would seem, has identical effect as the old wording. With regard to the second alteration, whenever the trial Court is directed to hear and determine the suit it does so always having regard to the observations contained in the judgment of the appellate Court making such a direction. The 7th defendant preferred an appeal to this Court by way of second appeal against the decree and order of the learned Subordinate Judge directing the District Munsiff to try the suit. In respect of that second appeal an application was made to Rajamannar, J., to grant a stay of the order of the learned Subordinate Judge so that until disposal of the second appeal, the learned District Munsiff, would not try the suit on the merits. The learned Judge acceded to the application and granted a stay. It is to be observed that the order, apart from the questions which are hereafter discussed was perfectly proper. If the appellant 7th defendant in the suit is successful in the second appeal, then it will be entirely unnecessary for the learned District Munsiff to hear and determine the suit upon its merits and if he does so, in those circumstances, it would be waste of judicial time and occasion an entirely unnecessary expenditure of litigant's money.

At the outset a preliminary point was taken on behalf of the 7th defendant-respondent that no appeal lies in the present instance. It was argued that the order of Rajamannar, J., granting a stay, is not a "judgment" within the contemplation of that word in clause 15 of the Letters Patent. Consequently no appeal lies. The relevant wording of the Letters Patent which was added by an amendment made in 1929 is the following :

"An appeal shall lie to the said High Court from a judgment of one Judge of the said High Court . . . . . . made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court."

The application made to Rajamannar, J., was referable to a second appeal then pending before this Court and in dealing with it, there is no doubt, the learned Judge was exercising appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by the Subordinate Judge's Court of Guntur, which is subject to the superintendence of this Court.

In my view this matter is covered by a decision of a Full Bench of this Court in *Tuljaram* v. *Alagappa Chettiar*[1]. There, Sir Arnold White, C.J., observed at page 7 as follows:

> "I think, too, an order on an independent proceeding which is ancillary to the suit . . . . but with a view to rendering the judgment effective if obtained, *e.g.*, an order on an application for an interim injunction, or for the appointment of a receiver is a "judgment" within the meaning of the clause."

Later on the same page he observed :

> "I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding."

Here, the order which Rajamannar, J., made was one in an application the subject-matter of which had the view of rendering the judgment effective if obtained. By judgment, in this case, is meant the judgment in second appeal. If the appellant, the seventh defendant in the suit is successful, then an investigation of the merits of the suit becomes unnecessary in the District Munsiff's Court and to that end a stay of the hearing of the suit would render the judgment effective. For the reasons given, the preliminary objection, in my opinion, should fail.

Now coming to the merits. The sole argument in support of the appeal was this. After the learned Subordinate Judge had delivered judgment and a decree in accordance with it was passed directing a trial of the suit by the District Munsiff, the 7th defendant made an application to the learned Subordinate Judge for review ; that review was allowed. Consequently, there was a fresh decree passed in the appeal to the learned Subordinate Judge and, therefore, the present appeal pending in this Court is incompetent and there should have been an appeal against the order made in review.

In support of the contention, reference was made to *Vadilal* v. *Fulchand*[2], and particularly to the observations of Sir Lawrence Jenkins, C.J., at page 60 where it is observed that, in effect, if a review application is heard and is allowed on the merits and the original decree even may be repeated, nevertheless, there is a new decree and no appeal lies against the earlier decree. The decision in *Kanhaiya Lal* v. *Baldeo Prasad*[3], was also cited ; there, upon review of a judgment in appeal, the decree was modified in important particulars and a new decree was passed and it was held that an appeal lay against the second decree but none against the first.

In my opinion those cases are not in point in the present instance. The review sought one object and one end only, *viz.*, to have set aside the previous decree and order of the learned Subordinate Judge directing the District Munsiff to hear and determine the suit. There are some five grounds for review each of which was for the purpose already stated. Ground (*e*) is in express language and states that the appeal to the learned Subordinate Judge should have been dismissed. Whilst in his judgment, the learned Judge makes two very minor and it would seem unnecessary textual alterations to the decree, the prayer sought by the review was not granted. The learned Judge does observe that he allowed the application for review and substituted the words mentioned in place of the existing words and ordered a deletion but that does not, to my mind, correctly express what in fact took place. What took place was a dismissal or rejection of the review application but some unasked and unsought and I would add, quite unnecessary, textual alterations were made to the wording of the original decree. Further it would appear that there is no other decree in the Court and there is no amended decree on record.

1. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.).
2. (1905) I.L.R. 30 Bom. 56.
3. (1905) I.L.R. 28 All. 240.

The only ground urged in support of the appeal was the one above mentioned, and its correctness I am unable to accept. In my view, the order which the learned Judge made was correct and it follows that this appeal should be dismissed with costs.

Bell, J.—I agree.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, AND MR. JUSTICE TYAGARAJAN.

Dakshinamoorthi Kandar .. *Appellant**

v.

Ponnuswami *alias* Karuppa Kandar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 9 *and Order* 17, *rule* 3—*Adjourned hearing—Party appearing in person—Application for adjournment and issue of commission refused—Dismissal of suit on refusal of party to proceed with case—Restoration—Applicability of Order* 9, *rule* 9.

On the date fixed for hearing of a suit the plaintiff's vakil asked for an adjournment on the ground that the witnesses for whom batta had been paid had not been served and also as attempts at a settlement were in progress. The Court however directed that the documents should be marked and the plaintiff examined. Thereupon the plaintiff's vakil reported " no instructions." Thereafter, the plaintiff in person asked for an adjournment and the same having been refused requested the Court to take up the case the next day so that he might engage a vakil and be ready to proceed with the trial, and the Court acceded to his request. The next day, however, the plaintiff appeared in person and filed two applications one for the examination of a witness on commission and the other for adjournment of the suit. The Court thereupon directed the plaintiff to examine himself, mark his documents and deposit the amount necessary for having the witness examined on commission. The plaintiff, however, did not agree and then the Court refused the application for adjournment and dismissed the suit and the application for the issue of a commission. The plaintiff having applied to set aside the order of dismissal under Order 9, rule 9, Civil Procedure Code,

Held, that in the circumstances the dismissal of the suit was under Order 17, rule 3, Civil Procedure Code, and hence no application lay under Order 9, rule 9 of the Code.

Case-Law discussed.

Appeal against the order of the Court of the Subordinate Judge of Salem, dated 16th July, 1945 in I.A. No. 124 of 1945 in O.S. No. 20 of 1944.

V. C. Viraraghavan for Appellant.

N. Sivaramakrishna Aiyar and N. S. Raghavan for Respondents.

The Court delivered the following

JUDGMENT :— *Tyagarajan J.* :—This appeal arises out of an order passed by the learned Subordinate Judge of Salem refusing the plaintiff's application to set aside the dismissal for default of a suit which had been filed *in forma pauperis*. The application purported to be one made under Order 9, rule 9 of the Civil Procedure Code. Two objections were taken by the contesting defendants, *viz.*, (1) that the order of the lower Court dismissing the suit was one made under Order 17, rule 3 of the Code and that consequently no application to set aside the dismissal would lie under rule 9 of Order 9 of the Code and (2) that in any event there was no sufficient cause which would justify the setting aside of the dismissal. The learned Subordinate Judge overruled the first objection holding that the dismissal of the suit was under Order 9, rule 8 of the Code, but on the merits he held that there was no sufficient cause and dismissed the application.

The facts relevant to the determination of this appeal are the following. The application to sue *in forma pauperis* was made on 2nd September, 1942. It was registered as a suit on 29th January, 1944. Issues were settled on 31st August, 1944. The suit was posted for trial to 17th October, 1944, and adjourned to 20th

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A. A. O. No. 32 of 1946. 12th September, 1947.

October, 1944, to be dealt with along with a petition which had been filed. On that date neither party was ready and as older suits were also being tried the suit was adjourned to 15th December, 1944. It was again adjourned to 4th January, 1945, as other suits were being tried. On that date the plaintiff's vakil asked for an adjournment on the ground that the witnesses for whom batta had been paid six days after the date of the last hearing had not been served and that there were also attempts at settlement with defendants 6 and 7. The Court not being satisfied that batta had been paid promptly asked that all the documents should be marked on that date and the plaintiff examined. Thereupon the plaintiff's vakil reported "no instructions." The plaintiff in person then wanted a long adjournment which was refused and thereupon the plaintiff agreed to the case being adjourned to the 5th January, so that he might engage a vakil and be ready to proceed with the trial. On the 5th January, the plaintiff did not engage a vakil and was not ready to go on with the trial. He presented two applications in person to the Court, one for the examination of a witness, one Mallikarjuna Iyer, on commission and the other for an adjournment of the suit. The Court asked the plaintiff to examine himself, mark his documents and to deposit on the 6th January, the amount necessary for examining Mallikarjuna Iyer, on commission. The plaintiff did not agree and thereupon the learned Judge refused the application for adjournment and dismissed the suit and also the application for the issue of a commission.

It is obvious that the plaintiff applied to the lower Court for setting aside the order of dismissal of the suit on the footing that that order was passed under Order 9, rule 8 read with Order 17, rule 2 of the Code and the appeal before us purports to be under Order 43, rule 1 (*c*) of the Code. The short question in this appeal is whether the plaintiff was entitled to make the application to the lower Court under Order 9, rule 9 of the Code. It would be seen from the facts already set forth that the plaintiff appeared at the adjourned hearing of the suit on the 5th January, and though no formal order of revocation of the vakalat had been made, the vakil had retired from the case on the day previous. On the 5th January, the plaintiff was not in fact represented by any counsel to conduct his case and was a litigant entitled to prosecute his case in person. Indeed, as already observed, he filed the application to examine a witness on commission in person. Can it be said in these circumstances that the plaintiff did not "appear" when the suit was called on for hearing so as to attract the operation of Order 9, rule 9 of the Code? In my opinion, the plaintiff appeared at the hearing and the dismissal of the suit was not under rule 8 read with Order 17, rule 2 of the Code.

It is now well established by decisions of this and of some other High Courts that the mere physical appearance in Court of a party who has engaged an advocate who reports at the hearing that he has no instructions to conduct or defend a suit will not amount to "appearance" though the Bombay High Court has taken a different view (*see* the decision in *Sundarlal* v. *Goorprasad*[1].) The cases relied on by Mr. V. C. Viraraghavan, the learned advocate for the appellant are all cases in which an advocate is on record for a party and an application for adjournment is made by or on behalf of the advocate and it is refused and thereupon the Court is intimated that the advocate has no instructions to go on. In all such cases it has been held that the mere physical appearance of the party is not sufficient to disentitle him to apply for setting aside the dismissal for default of a suit or a decree passed *ex parte* under the provisions of Order 9 of the Code.

In *Kaliappa Mudaliar* v. *Kumaraswami Mudaliar*[2], the defendant's pleader and the defendant were both present at the hearing and the pleader reported he had no instructions. On the suit being decreed it was held that the defendant was entitled to have the decree set aside under Order 9, rule 13 of the Code as the appearance should be as a party with the intention of acting as such party in the suit and "not as a man." In *Authimoolam Pillai* v. *The Secretary of State for India in Council*[3], the pleader and the party were present in Court and both of them said

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1. (1898) 23 Bom. 414.
2. (1926) 51 M.L.J. 290.
3. (1927) 54 M.L.J. 351.

that they were not prepared to go on with the suit and it was dismissed. It was held by a Division Bench that it was a dismissal for default of appearance under Order 17, rule 2 of the Code. The cases reported in *Venkateswara Rao* v. *Subramania*[1], *Kovummal Ammal, In re*[2], and *Garpati China Basava Satyanarayana* v. *Hindu Religious Endowments Board, Madras*[3], are similar cases and need not be discussed.

Strong reliance was placed by Mr. Veeraraghavan on the decisions reported in *Sikandar Ali* v. *Kushalchandra Sarma*[5], and *Sardarmal Seraogi* v. *Jaharmal Chiranjilal*[5]. In the first case the plaintiff had engaged two pleaders to conduct his case both of whom were absent at the hearing. An adjournment was applied for by the plaintiff and also by his pleader (apparently engaged to represent the pleaders who were absent). The adjourment was refused and the suit was dismissed. An application for restoration was made under rule 9 and was held to be sustainable. Reliance is placed on the passage at page 758.

> " Turning to the Code itself, order 9, rule 8 says that :' where the defendant appears and the plaintiff does not appear when the suit is called on for hearing. . . .'
>
> The word 'appear " in this rule apparently means 'appearing in the suit.' A party may be present in the precincts of the Court or he may be found present in the Court room, but, if he does not, take part in the suit, it cannot be said that he has ' appeared.' This is what is meant by order 9, rules 6 and 8. If a plaintiff comes to Court and files an application for adjournment and, when the application is refused, he retires from the suit, though he may not have physically retired from the Court, he is not to be considered any longer to be present in the suit and any order passed, in such circumstances, must be taken to be an order passed *ex parte*."

In the second case the plaintiff stated that his pleader was engaged in another Court and he applied for an adjournment. The suit was dismissed, an adjournment being refused. Follo ing the earlier case reported at page 756, Mukerjee, J., held that an application under rule 9 to set aside the dismissal was maintainable. In my view both these cases are clearly distinguishable and fall in line with the Madras decisions referred to by me.

Mr. N. Sivaramakrishna Aiyar, learned Counsel for the respondents has referred us to the decision reported in *Govindarajulu* v. *Impetial Bank of India*[6]. In that case one of the issues had already been determined and on the adjourned date first defendant's pleader filed an additional written statement and on his application the Court also framed an additional issue. The pleader thereafter applied for an adjournment on the ground that the first defendant was unable to be present on account of illness. Adjournment was refused and the case proceeded to trial and a decree was passed against the first defendant. It was held that the first defendant was not *ex parte* and not entitled to apply under Order 9, rule 13 to set aside the decree.

In the light of the authorities and the facts of the case with which we are concerned, I am clearly of the view that the plaintiff " appeared " on the hearing of the suit and also took a step in the prosecution of the suit by filing the application in person for the issue of a commission. The dismissal of the suit on adjournment being refused was and could only be in the circumstances under Order 17, rule 3. No application therefore lay to the lower Court under rule 9 of O. 9 of the Code.

In this view it is unnecessary to consider whether on the merits the dismissal of the suit should have been set aside. This appeal therefore fails and is dismissed with costs of the contesting 8th respondent.

The Chief Justice.—I have had the advantage of reading the judgment just delivered by my learned brother. I agree with the conclusion expressed and the reasons given, and have nothing to add.

B.V.V. *Appeal dsimissed.*

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1. (1939) 2 M.L.J. 611.
2. A.I.R. 1934 Mad. 199.
3. (1945) 1 M.L.J. 331.
4. (1931) I.L.R. 59 Cal. 756.
5. (1931) I.L.R. 59 Cal. 906.
6. (1934) 68 M.L.J. 123 : I.L.R. 58 Mad. 817.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL, AND MR. JUSTICE GOVINDARAJACHARI.

Vangayil Madhavan Nayanar .. *Appellant**

v.

V. Parameswara Ayyar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 5—Imperative nature of—Payment to motgagee or satisfaction of the claim out of Court 30 days after sale of hypotheca in execution—Not sufficient to enable the mortgagor to claim benefit of Order 34, rule 5—Order 21, rule 2 not applicable after sale in execution—Auction purchaser retaining the five per cent on his purchase money—Bar to his raising an objection as to non-compliance with Order 34, rule 5.

After a sale of the hypotheca in execution of a final decree for sale it is not open to the mortgagor more than 30 days after the sale but before its confirmation, to pay out of Court, the amount due to the decree-holder or otherwise satisfy him and claim the benefit of Order 34, rule 5 of the Civil Procedure Code. The language of that rule is imperative and the sale cannot be set aside unless the decree amount is deposited in Court for satisfaction of the decree. A payment or adjustment out of Court will not be compliance with the strict requirement of that rule. Order 21, rule 2 of the Code is not applicable after the sale of the hypotheca.

The mortgagor's right to redeem at the various stages of suits and execution reviewed.

However, the auction purchaser who through his advocate receives and retains the five per cent on his purchase money is precluded from raising an objection as to the non-compliance with the strict requirement of Order 34, rule 5 of the Code.

Case-law discussed.

Appeal and Civil revision petition against the judgment and order of the District Court of North Malabar in E.A. No. 25 of 1945 in O.S. No. 15 of 1945 dated 10th March, 1945, etc.

A. Achutha Nambiar for Appellant.

K. P. Ramakrishna Aiyar and *T. R. Ramachandran* for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—The facts necessary for the disposal of the above civil miscellaneus appeals and civil revision petition can be shortly stated. In O.S. No. 15 of 1933, on the file of the District Judge of Morth Malabar, which was a suit for sale on a mortgage, a preliminary decree was passed on 13th September, 1934, followed by a final decree on 27th January, 1936. The mortgaged property was sold in execution and purchased by one Vengayil Madhavan Nayanar who is the appellant in the civil miscellanous appeals and the petitioner in the civil revision petition and who will hereinafter be referred to as the appellant. On 16th November, 1944, the first defendant in the mortgage suit applied in E. A. No. 52 of 1944 under Order 21, rule 90 of the Code of Civil Procedure for setting aside the sale. This application underwent several adjournments. On 6th March, 1945, the decree-holders applied in E. A. No. 25 of 1945 under Order 21, rule 2 for recording full satisfaction of the decree alleging that the first defendant agreed to pay and the decree-holders agreed to receive Rs. 6,750 in full satisfaction of the decree, that Rs. 4,695 out of the said amount was paid to the decree-holders by the first defendant that in discharge of the balance of Rs. 2,055 both parties agreed that an order for payment should be made in favour of the decree-holders of the sum deposited as security by the first defendant in E. A. No. 52 of 1944. In what is described as a "statement" filed by the first defendant's advocate on 8th March, 1945, it was mentioned that "Rs. 231-3-0 made up of poundage and sale commission due to the auction purchaser as per the auction sale held in O. S. No. 15 of 1933 was paid to the advocate for the auction purchaser by the first defendant's advocate." The auction purchaser's advocate endorsed on it that he received the amount.

On 10th March, 1945, the learned District Judge directed that full satisfaction of the decree should be recorded and that the sale should be cancelled, overruling

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*A.A.O. Nos. 507 and 508 of 1945. (C.R.P. No. 1060 of 1945 and C.M.P. Nos. 1465 and 1466 of 1947). 15th September, 1947.

the auction purchaser's objection which, in the District Judge's language, was to the effect:

"That the private adjustment of the decree ought not to be recognised but that the full decree amount due must be deposited in Court and then withdrawn by the decree-holders and that the decree-holders receiving the amount otherwise must not be upheld."

The learned District Judge characterised this objection as a technical one, after referring pointedly to the fact "that the auction purchaser has been paid his commission of five per cent. and poundage." While noticing that Order 34, rule 5 of the Civil Procedure Code prescribes that the defendant should deposit in Court the sum due as per the decree, the learned District Judge observed that it does not specifically prohibit private adjustments of the decree by any arrangement arrived at between the judgment-debtor and the decree-holders. The learned District Judge was of the opinion that this principle was established in *Muthuvenkatapathi Reddi* v. *Kuppu Reddi*[1] in regard to deposit in Court required by Order 21, rule 89 and held that the same principle must govern the requirement as to deposit under Order 34, rule 5.

In this view the application under Order 21, rule 90 was no longer necessary and it was accordingly dismissed. A. A. O. No. 508 of 1945 is against the order in E. A. No. 52 of 1944 while A. A. O. No. 507 of 1945 and C. R. P. No. 1060 of 1945 are against the order in E. A. No. 25 of 1945.

It is contended on behalf of the auction purchaser that the reliance by the learned District Judge on the decision in *Muthuvenkatapathi Reddi* v. *Kuppu Reddi*[1] is misplaced, that the language of Order 34, rule 5 is imperative and that as the amount due to the decree-holders was admittedly not deposited in Court for satisfaction of the decree, the sale cannot be set aside. For the judgment-debtor it is argued that Order 21, rule 2 would apply even after the sale of the mortgaged property and that satisfaction of the decree can therefore be recorded when payment is made out of Court or the decree is otherwise adjusted notwithstanding that a sale has already taken place. It is also argued that the learned District Judge correctly interpreted the decision in *Muthuvenkatapathi Reddi* v. *Kuppu Reddi*[1] and was justified in applying its principle to a case arising under Order 34, rule 5 which is described as a provision analogous to Order 21, rule 89. The respondents' advocate raises the further contention that it is not open to the appellant to question the correctness of the orders of that Court in view of what transpired before and at the time when those orders were made. We shall deal with this last aspect of the case separately and in due course.

The principal question that has to be decided is whether, after a sale of the hypotheca in execution of a final decree for sale, it is open to the mortgagor more than 30 days after the sale but before its confirmation, to pay, out of Court, the amount due to the decree-holder or otherwise satisfy him and claim the benefit of Order 34, rule 5 of the Civil Procedure Code, or in other words, whether or not the requirement of the said rule that the said amount must be deposited in Court is obligatory and is strictly to be complied with.

Elaborate arguments have been addressed and a large number of decisions have been referred to by Mr. Achuthan Nambiar for the appellant and by Mr. Ramakrishna Iyer for the respondent. While it is conceded that there is no ruling which directly deals with the point arising for determination in this case it is claimed that some light is thrown on it and some guidance afforded by decisions which deal with various stages of suits and execution when a mortgage is sought to be enforced by a sale of the mortgaged property.

It will be convenient to deal with the provisions bearing upon and the decisions relating to each of these several stages in their sequence. First as to the stage between the preliminary decree and the final decree, Order 34, rule 4 (1) which prescribes the form of a preliminary decree for sale runs as follows:

"In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (*a*), (*b*) and (*c*) (*i*) of sub-rule (1) of rule 2, and further directing that, in default

1. (1940) 1 M.L.J. 629 : I.L.R. 1940 Mad. 699 (F.B.).

of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court . . . . "

How the amount so paid is to be applied is laid down in the latter portion of sub-rule 1, but it is unnecessary to quote it. Order 34, rule 2, sub-rule (1) clauses (*a*), (*b*) and (*c*) (*i*) have to be read into Order 34, rule 4, sub-rule (1) with the result that a preliminary decree for sale must contain an order directing

"that an account be taken of what was due to the plaintiff at the date of the preliminary decree for principal and interest on the mortgage, the costs of suit, if any, awarded to the plaintiff, and other costs, charges and expenses properly incurred by him upto that date in respect of his mortgage secutrity, together with interest thereon"

or in the alternative a declaration of "the amount so due at that date." There must besides be included in such preliminary decree a direction

"that, if the defendant *pays into Court* the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account so taken,"

or from the date on which such amount is so declared

"the plaintiff shall deliver up to the defendant all documents in his possession or power relating to the mortgaged property and shall, if so required, retransfer the property to the defendant and shall also, if necessary, put the defendant in possession of the property."

We have omitted all mention of the further amounts which the defendant has to pay by way of subsequent charges and expenses as provided in rule 10 or subsequent interest as provided in rule 11, as that part of Order 34, rule 2 (1) (*c*) (*i*) which refers to them does not bear on the point now at issue. Order 34, rule 5 (1) contemplates two stages. One is before the day fixed for payment as contemplated by the combined operation of Order 34, rule 4 (1) and Order 34, rule 2 (1) (*c*) (*i*). If before that day the defendant makes *payment into Court* of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree which has the effect of cancelling the mortgage and of restoring the defendant to the position he occupied before he executed the deed of mortgage. If payment before the day fixed is not made the Court shall, under Order 34, rule 5 sub-rule (3) on application made by the plaintiff in this behalf pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4. After a sale takes place in pursuance of a final decree the defendant is given by another part of Order 34, rule 5 (1) a further chance to save his property. We shall set out this portion of Order 34, rule 5 (1) when dealing with that stage in the course of the examination of the final decree. That in fact is the stage with which we are in this case, directly concerned.

The form of the preliminary decree appended to the Code of Civil Procedure (*see* Schedule I Appendix D form No. 5-A which is the form to be followed when the Court declares, as is very often done, the amount due) closely follows the provisions of Order 34, rule 4 (1).

"It is necessary only to refer to paragraph 2 of that form whereby it is ordered and decreed that the defendant do *pay into* '*Court* on or before the....day of...., or any later date up to which time for payment may be extended by the Court the said sum of Rs. ...."

In view of the language of Order 34, rule 4 (1) read with the relevant portions of Order 34, rule 2 (1) the form of decree we have referred to and the allied form No. 5 which is adopted where accounts are directed to be taken, as also from the language of order 34, rule 5 (1) in so far as it relates to the stage before a final decree, the view was at one time taken in this Court that all adjustments made out of Court between the dates of the preliminary decree and the final decree cannot be pleaded against the passing of the final decree, that the provisions of Order 34, recognising only one method of payment, namely, payment into Court are imperative and that these provisions were advisedly inserted in modification of the corresponding provisions of sections 88 and 89 of the Transfer of Property Act which provided for payment

to the plaintiff or into Court (See *Rasan Chettiar* v. *Rangayyan Chettiar*[1]). The same view was taken in an earlier decision in *Singaraja* v. *Pethu Raja*[2] and in the later decisions in *Adari Sanyasi* v. *Nookalamma*[3] and *Periakaruppan Chettiar* v. *Doraiswami Naicken*[4].

These decisions, however, are no longer good law in view of the judgment of the Judicial Committee in *Madan Theatres Ltd.* v. *Dinshaw and Co., Ltd.*,[5]. In that case the Privy Council pointed out that the mortgage suit must be taken to be continuing upto the final decree for sale and that payment or adjustment out of Court before the final decree would therefore come under Order 23, rule 3 of the Civil Procedure Code. It was emphasised that there is no qualification to the wide terms of Order 23, rule 3 nor any grounds limiting its application and it was therefore held that under that rule it is open to a debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received between the preliminary decree and the final decree. In this view of Order 23, rule 3, the Privy Council refrained from considering the question

"whether the provisions of order 34 are, if it stood alone, sufficiently precise to prohibit the compromise of the preliminary decree in a mortgage suit by payment or adjustment in some way other than that directed by the preliminary decree."

In C. M. A. No. 29 of 1945 it was noticed that the Madras decisions to which we have referred above are overruled by the recent decision of the Judicial Committee just mentioned. The learned Judges in A. A. O. No. 29 of 1945 added that the decision of the Full Bench in *Palaniappa Chettiar* v. *Narayanan Chettiar*[6] must also be taken to have been overruled by the decision in *Madan Theatres, Ltd.* v. *Dinshaw and Co., Ltd.*[5] We unable to follow this as the Full Bench in *Palaniappa Chettiar* v. *Narayanan Chettiar*[6] was concerned with the question whether an application for the passing of a personal decree under Order 34, rule 6 is an application in execution. It was pointed out that such an application has reference to one of the reliefs in the plaint in a mortgage suit which must to that extent be still regarded as pending and that the application must therefore be regarded as an application in the suit, notwithstanding that it cannot be made before it is found that the proceeds of the sale of the mortgaged property are insufficient to pay the amount due to the plaintiff. We do not see how this can be said to be in conflict with anything said by the Judicial Committee in *Madan Theatres, Ltd.* v. *Dinshaw and Co., Ltd.*[5], which dealt as has already been said, with another and a quite different stage, *viz.*, that between the preliminary decree for sale and the final decree for sale. The learned Judges in *Palaniappa Chettiar* v. *Narayanan Chettiar*[6] refer no doubt to *Singaraja* v. *Petharaja*[2] but they make the reservation that they do not wish to be understood as accepting its correctness and also point out that that decision has no bearing on the question under their consideration.

The inapplicability of Order 21, rule 2 which relates to the stage of execution, to any payment or adjustment made between a preliminary decree and a final decree for sale is also pointed out in *Madan Theatres, Ltd.* v. *Dinshaw and Co., Ltd.*[5].

The second stage is that between a final decree for sale and the sale itself. Under Order 34, rule 5 (3) and form No. 6 of Appendix D to schedule No. 1, a final decree for sale first recites that the payment directed by the preliminary decree has not been made by the defendant and then proceeds to provide that the mortgaged property or a sufficient part thereof be sold. If any payment is made or satisfaction is given during this period there is no reason why the provisions of Order 21, rule 2 cannot be availed of. In fact the appellant's advocate admitted that that rule would be applicable. If the provisions of Order 21, rules 64 to 103 are applicable to sales in execution of mortgage decrees, as they presumably are,

1. A.I.R. 1930 Mad. 105.
2. (1918) 35 M.L.J. 579 : I.L.R. 42 Mad. 61.
3. (1930) 54 Mad. 708.
4. (1940) 1 M.L.J. 134.
5. (1945) 2 M.L.J. 367 : L.R. 72 I.A. 277 : 20 Luck. 461 (P.C.).
6. (1935) 69 M.L.J. 765 : I.L.R. 59 Mad. 188 (F.B.).

except where a particular rule is made inapplicable either by an express provision or possibly by the context, the mortgagor-judgment-debtor can avail himself also of the provisions of Order 21, rule 66 and bring to the notice of the Court at the time of the settlement of the sale proclamation any payment which he may have made or satisfaction which he may have given to the mortgagee-decree-holder previously thereto, provided he is within 90 days of such payment or satisfaction. (*see* Article 174 of the Limitation Act).

After the sale of the mortgaged property the position is much more complicated. This constitutes the third stage. Within thirty days of the sale it is open to the mortgagor to apply under Order 21, rule 89 for setting aside the sale provided he deposits into Court such balance as may remain out of the amount specified in the prolcamation of sale after giving credit to any amount which may have been received by the decree-holder and also deposits into Court for payment to the purchaser a sum equal to five per cent. of the purchase money.

A question has arisen whether under Order 21, rule 89 sub-rule 1 clause (*b*) credit could be given when the judgment-debtor paid no cash but gave the decree-holder money's worth or obtained from the decree-holder a waiver or remission of the whole or a portion of the amount due under the decree. In *Muthuvenkatappa Reddi* v. *Kuppu Reddi*[1] a Full Bench of this Court held, approving three earlier decisions, that any payment or adjustment made by the judgment-debtor to satisfy the decree-holder is "receipt" of an amount within the meaning of Order 21, rule 89 clause 1 (*b*). The respondents' advocate referred to the observations of Krishnaswami Aiyangar, J., who was a member of the Full Bench, occurring at page 715 of the report which are as follows :

> "The true view to take of Order 21, rule 89, Civil Procedure Code is that what is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and Judged by the same principles as those applicable to a deposit. By that consent, what was not in fact a payment in cash is turned into a deposit within the meaning of the rule to be acted upon by the Court in all respects as if it were a payment in cash."

Relying on these observations the respondents' advocate claimed that the decision in *Muthuvenkatappa Reddi* v. *Kuppu Reddi*[1] is an authority for the wider proposition that, notwithstanding any requirement in a statutory provision, whether Order 21, rule 89 or Order 34, rule 5 that payment should be made into Court, it is open to the parties to dispense with it by agreement and receive payment or its equivalent outside Court. With great respect we are unable to agree with the observations of Krishnaswami Aiyangar, J., just referred to. On an examination of the judgment of the Chief Justice with whom King, J., agreed as also of the earlier decisions which have been referred to with approval by the Full Bench it is quite clear that what the Full Bench was concerned with in *Muthuvenkatapathi Reddi* v. *Kuppu Reddi*[1] is whether the words "amounts received by the decree-holder" occurring in clause (*b*) of sub-rule 1 of Order 21, rule 89 must be strictly construed so as to exclude from their purview and operation all satisfaction or adjustment otherwise than in cash. It was held that they should not be so construed. We are therefore unable to agree with the argument of the respondents' advocate and the view of the lower Court that the decision in *Muthuvenkatapathi Reddi* v. *Kuppu Reddi*[1] laid down that a statutory requirement as to deposit can be ignored when the decree-holder is prepared to waive it or condone its non-observance.

If the application had been within thirty days of the sale it would no doubt have been open to the judgment-debtor to prove that the decree-holder "received" the amounts specified in the proclamation of sale in the manner alleged in E. A. No. 25 of 1945. But that application as also the payment of 5 per cent. of the purchase money to the auction purchaser two days later, being obviously beyond thirty days of the sale, the judgment-debtor can if at all, avail himself only of the provisions of Order 34, rule 5 which for the present purpose may be quoted as follows :

1. (1940) 1 M.L.J. 629 : I.L.R. (1940) Mad. 699(F.B.).

"(1) Where, ... at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant *makes payment into Court* of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass an order . . . . . . "

which would have the effect of cancelling the sale already held and restoring the property free from encumbrance to the mortgagor.

(2) "Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), *deposits in Court* for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser. Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase money paid into Court by him, together with a sum equal to five per cent. thereof."

There is no reason to think that the language of this rule is otherwise than imperative, and we see no ground for holding that a payment or adjustment out of Court would be compliance with the strict requirements of this rule.

It has, however, been argued by the respondents' advocate that Order 21, rule 2 can be invoked by his client and that such payment or adjustment as was made by the judgment-debtor can be recognised and recorded under its provisions. To this argument the appellant's advocate has an effective answer. In the decision in *Seth Nanhelal* v. *Umrao Singh*[1] which has been cited on the appellant's behalf, the Privy Council rejected an argument similar to the one now advanced for the respondent. The following passage from their judgment may be usefully quoted :—

"In the first place, Order 21, rule 2 which provides for certification of an adjustment come to out of Court, clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third party interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in rule 89, *viz.*, by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale : *See* Article 166, Schedule I of the Limitation Act, 1908. That this is so is, in their Lordships' opinion, clear under the wording of rule 92, which provides that in such a case (*i.e.*, where the sale has been duly carried out), if no application is made under rule 89, 'the Court *shall* make an order confirming the sale and thereupon the sale shall become absolute.' "

In view of this decision there is, in our judgment, no room for the argument that Order 21, rule 2 is applicable even after a sale of the mortgaged property. Dealing with a mortgage decree, we are of the opinion, that Order 21, rule 89 and, or Order 34, rule 5 alone can apply after the stage of sale, the former being obviously available only within thirty days of it.

We see no real hardship from the view we have indicated. The mortgagor-judgment-debtor has ample opportunities of reducing his indebtedness and having it recognised by Court whatever shape or form the satisfaction given to the mortgagee decree-holder may have taken. He could do so under Order 23, rule 3 between the preliminary and the final decrees for sale. He could invoke the aid of Order 21, rule 2, and Order 21, rule 66 between the final decree and the sale itself. He could avail himself of Order 21, rule 89 after the sale but within 30 days of it. A further chance has no doubt been given to him for saving his property by amending Order 34 rule 5 in 1929, notwithstanding all his previous laches and default, but if he is to avail himself of this new privilege he must comply with its somewhat stringent provisions.

We may notice in passing that *Seth Nanhelal* v. *Umrao Singh*[1] was itself a case of a mortgage decree, but no reference was made therein to Order 34, rule 5 because though the judgment of the Privy Council was given on the 16th December, 1930, all the events with which their Lordships had to deal happened in 1923, 1924 and 1925 and therefore several years before Order 34, rule 5 was amended by the

1. (1930) 60 M.L.J. 423 : L.R. 58 I.A. 50 (P.C.).

Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation in 1st April, 1930, and, which, for the first time provided for a deposit and an application at any time before the confirmation of the sale. The reasoning however of their Lordships of the Privy Council in *Seth Nanehelal* v. *Umrao Singh*[1] will apply with equal force even after the amendment and will exclude the application of Order 21, rule 2 once a sale in execution of the final decree takes place. The result is that the application by the decree-holder under Order 21, rule 2 on 6th March, 1945 cannot be regarded as compliance with the provisions of Order 34, rule 5.

It is argued by the respondents' advocate that the statement signed by the advocates for the auction purchaser and the judgment-debtor on 8th March, 1945, and filed into Court on that day may be regarded as an application under Order 34, rule 5 particularly in view of certain decisions which were relied on as holding that an application under Order 34, rule 5 or Order 34, rule 6 need not even be in writing. We agree that any informality in the manner in which the application was made or in its contents will not stand in the way of the judgment-debtor obtaining the appropriate relief under Order 34, rule 5. It is, however, unnecessary to pursue this matter further, as in our view, the main requirement of Order 34, rule 5 has not been satisfied in so far as the judgment-debtor did not deposit into Court what was due to the decree-holder.

It now remains to deal with a further contention raised by the respondents' advocate for maintaining the order of the lower Court. It is argued that whatever may be the correct position as regards the necessity of a deposit into Court of the amount due to the decree-holder, the appellant is precluded from raising this objection in view of his conduct in retaining the five per cent. on his purchase money which had been paid to his advocate on 8th March, 1945. It will be recalled that this amount was received without objection on that date and that on 10th March, 1945 when the applications were heard and disposed of, no objection was taken that the amount due to the auction purchaser was not paid or that it should have been paid into Court. The amount was not paid back then or since. On 10th March, 1945, there was no offer even to return it though about the effect of a mere offer of that kind we do not desire to express our opinion. It has been said that the advocate had no authority to receive it. *Prima facie* he would have. and assuming he had not, there is no reason why this was not stated to the Court on 10th March, 1945, or why as between the auction purchaser and the defendant the former did not restore the amount or see that it was restored by his advocate. Having, in a question between himself and the mortgagor, retained the benefit of a payment which he would be entitled to only if the sale is to be set aside as contemplated by Order 34, rule 5 we do not see how he can now be heard to say that the mortgagor is not entitled to the benefits of that provision. The principle applicable to such situations is stated in Halsbury's Laws of England, Hailsham edition, vol. 13, para 512 to be merely an application of the doctrine that a man may not approbate and reprobate. It is stated further in that paragraph that:

"a party cannot, after taking an advantage under an order, be heard to say that it is invalid and ask to set it aside or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded."

The respondents' advocate drew our attention to *Tinkler* v. *Hilder*[2] *Venkatarayudu* v. *Chinna Ramakrishnayya*[3] *Sriramulu* v. *Venkatanarasimham*[4] and *Ranendramohan Tagore* v. *Keshebchandra Chanda*[5]. It is unnecessary to refer to these decisions or to the rulings relied on in them as the governing principle is clear. We need refer only to the instance stated at page 142 of the report in *Venkatarayudu* v. *Chinna Ramakrishnayya*[3] of a party liable under an order personally handing over the amount to his opponent, who, while insisting on keeping it, asserts that he receives it under protest, and it is pointed out that in such a case, his so-called protest cannot in the least avail him.

1. (1930) 60 M.L.J. 423: L.R. 58 I.A. 50 (P.C.).
2. (1849) 4 Exch. Rep. 187.
3. (1929) 58 M.L.J. 137.
4. (1938) 2 M.L.J. 835.
5. (1934) 61 Cal. 433.

This argument for the respondent must, in the cirsumstances already pointed out, be upheld with the result that the two civil miscellaneous appeals and the civil revision petition are dismissed with costs with advocates' fee only in C. M. A. No. 507 of 1945. Two Counsel.

In C. M. P. No. 1466 of 1947, the appellant seeks the admission, as additional evidence in the appeals, of some correspondence which is said to have passed between him and his advocate after the disposal of the applications for the purpose of showing that the advocate had no authority to receive the amount which he did on the 8th March, 1945. This has no bearing on the rights *inter se* of the auction purchaser and the judgment-debtor. This petition and the connected petition, C. M. P. No. 1465 of 1947 are therefore dismissed.

No costs.

K.S. *Appeals and petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL AND MR. JUSTICE GOVINDARAJACHARI.

V. T. Elaya Pillai .. *Appellant**

v.

A.M. Muhammad Ibrahim Sahib and others .. *Respondents.*

Security bond—Construction—Surety undertaking to bring back amount if appeal is allowed—Appeal allowed in part—Effect on liability—Reference to order of Court in pursuance of which bond was executed for purposes of construing it—Permissibility.

Mesne profits—Computation—Collection charges—Principles for allowing deduction.

A security bond provided that if the appeal pending in the High Court be dismissed, the bond will stand cancelled and if the appeal be allowed and decree of the trial Court set aside, the amount taken out by the party should be brought back into Court. The decree having been only varied, on a construction of the security bond,

Held : If it is reasonably clear that the contingency in which the bond is sought to be enforced would not fall within the language of the condition it is not permissible to override that language in the light of what the parties intended if they did not succeed in expressing that intention in suitable language. If, on the other hand, on a fair reading of the bond in the light of the surrounding circumstances—the most important of such circumstances being the order pursuant to which the security is given—the Court considers that the contingency in which the security is sought to be availed of falls reasonably within the language of the condition which is sufficiently wide to comprehend it, there is no rule compelling the Court to adopt the stricter of the two constructions to both of which the language may be susceptible. Judged by this test the security bond in question would cover a partial allowance of the appeal as well as its total allowance. The surety was accordingly liable.

In computing mesne profits deduction for expenses of collection may be allowed. Where evidence is available as to expenses actually incurred in the process of collection there will not of course be any difficulty, the amount actually spent being, in the absence of any evidence that it was excessive or extravagant, a legitimate and permissible deduction. Even in the absence of any material to show the actual expenditure of realisation there is no reason why the Court should not take into consideration the comparative ease or difficulty of collection in any particular case and why the percentage allowed by way of collection charges should not be adjusted accordingly. The rule as to ten per cent. allowance as collection charges is not an inflexible one.

An allowance of five per cent. was considered justified in the circumstances of the case.

Appeals against the order of the District Court, South Arcot, dated 29th March, 1944 in M.A. No. 375 of 1942 in O.S. No. 43 of 1936.

K. S. Sankara Aiyar and V. Sundaresan for Appellant.

K. Bashyam, T. R. Srinivasan and M. S. Venkatarama Aiyar for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—C.M.A. No. 389 of 1944: This is an appeal against the decree of the District Judge of South Arcot determining the amount of the liability of the appellant under a security bond executed by him. The material

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*A.A.O. Nos. 389 and 442 of 1944. 4th September, 1947.

facts are the following. One Muthuswami Jadaya Goundan filed O.S. No. 43 of 1936 in the Court of the District Judge of South Arcot for the recovery of an impartible estate known as Jadaya Goundar Jaghir. The first defendant in the suit was the rival claimant. The second defendant was the first defendant's son and was impleaded *pro forma*. The third defendant claimed to be a lessee of the forest produce in the Jaghir under a lease granted in 1934 by the previous Jaghirdar for a period of seven years commencing from 16th July, 1936. The suit was decreed and it was held that the plaintiff was entitled to succeed to the estate on the death of the last holder. The lease in favour of the third defendant was held to be not binding on the plaintiff and was consequently set aside. Defendants 1 and 3 filed appeal No. 56 of 1939 in this Court. A receiver appointed during the pendency of that appeal paid certain amounts into Court from time to time. In November, 1941 the amount lying in deposit was about Rs. 12,000. The plaintiff applied for payment out of this amount and this Court directed in C.M.P. No. 6942 of 1941 that he may draw the amount upon furnishing security to the satisfaction of the District Court of South Arcot. In pursuance of that order the present appellant executed on the 18th April, 1942 a security bond the material portions of which we shall now refer to. After reciting that about Rs. 12,000 was lying in the Court of the District Judge of South Arcot to the credit of Jadaya Goundar estate the bond mentions that the plaintiff was permitted to withdraw the amount by the order of the High Court in C.M.P. No. 6942 of 1941, that he requested the executant to stand surety for the said amount and that he (the executant) agreed to do so. The bond then goes on to state that he executed the security bond binding himself " in the above manner ". There is a reference to the approval of the draft security bond by the District Judge and then occur the following clause which must be set out in full :

" If the appeal, A.S. No. 56 of 1939, against the decree of this Court, pending in the High Court be dismissed and the decree of this Court confirmed, then this security bond will stand cancelled. If, however, the appeal in the High Court be allowed and the decree of this Court set aside, and if this Court directs that the said sum of Rs. 12,000 (twelve thousand), should be brought back into Court, the said Muthuswami Jadaya Goundar will pay it back into Court. In default of his doing so, I will pay the aforesaid amount of Rs. 12,000. If the amount is paid in the aforesaid manner, then also this bond shall stand cancelled."

A.S. No. 56 of 1939 was dismissed by the High Court so far as the first defendant was concerned. The appeal of the third defendant, (second appellant) was, however, allowed and the suit against him was dismissed.

In pursuance of that decree the third defendant applied for restitution and he was held entitled to a sum of Rs. 5,417-1-0. The plaintiff was directed to pay that sum into Court on or before 29th April, 1944, and in default of such payment, the surety (the present appellant) was directed to pay the amount. On behalf of the appellant the first point taken by his Counsel is that on a construction of the security bond the appeallant is not liable in the events that have happened. It is argued that the security bond contemplated either the allowance of the appeal in its entirety or its dismissal and did not envisage the possibility of a partial allowance of the appeal and that since a contingency which is not provided for in the security bond has now arisen the surety is not liable.

Considerable argument has been addressed to us as to the principles governing the construction of security bonds but as pointed out in *Paramasivam* v. *Ramaswami*[1] :

" the only certain proposition of law which can be deduced from all the authorities cited as this, that each bond must be interpreted according to its own terms."

It is therefore necessary to address ourselves in the first instance to the language of the security bond. In substance the obligation of the surety is to arise on the making of a direction by the District Judge of South Arcot that the amount paid to the plaintiff or any part of it should be brought back into Court. This can

1. (1939) 1 M.L.J. 557 : I.L.R. 1939 Mad. 290 at 293.

no doubt occur only if the decree in O.S. No. 43 of 1936 is varied. Apart from this material portion of the security bond there is, as already stated, another portion where the surety states that he executed the security bond binding himself in the manner contemplated by the order of the High Court in C.M.P. No. 6942 of 1941.

Turning to that order there can be no doubt that when a person is permitted to draw an amount lying in Court on furnishing security to the satisfaction of that Court the security will be available, whether the whole or a portion of that amount is to be brought back into Court. The order of the High Court in C.M.P. No. 6942 of 1941 would be equally applicable whether the appeal is allowed in whole or in part and in consequence thereof the whole of the amount paid to the plaintiff becomes repayable or only a part of it. The argument on behalf of the appellant goes, as it necessarily must, so far as to say that whatever might have been intended by the High Court in its above order the security bond as executed provides only for the contingency of a complete allowance of the appeal. This argument seems to us to overlook the earlier portion of the security bond to which we have already drawn attention. In *Raja Raghunatha Prasad Singh* v. *Raja Kirtyanand Singh Bahadur*[1], the Privy Council held that:

> " the bond must be considered in the light of the order directing the security to be given."

After giving their interpretation of the security bond before them their Lordships described it as " the true construction of this document having regard to the circumstances in which it was executed." The principle laid down in *Raja Raghunatha Prasad Singh* v. *Raja Kirtyanand Singh Bahadur*[1] was applied in *Mahendranath Banerji* v. *Sateeschandra Chowdri*[2]. In *Nedungadi Bank, Ltd.* v. *Doraikannu Ammal*[3], the question was whether a guarantee was a continuing guarantee. The learned Judges sum up the effect of the authorities as indicating :

> " that in deciding such a question the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is precluded from taking anything else into consideration."

In *Pratapsingh Maholabhai* v. *Kesavlal Harilal*[4], the Privy Council quote the following passage from the judgment of the Lord Chancellor in *Blest* v. *Brown*[5] :

> " It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He received no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into."

Among the cases cited on behalf of the appellant it is sufficient to refer to the following : In *Paramasivam* v. *Ramaswami*[6], the actual sentence in which the liability of the executant of the security bond was expressed ran as follows :

> " If the C.M.A. No. 375 of 1931 preferred by me to the High Court against the order appointing receiver is decided in favour of the said first plaintiff, I shall pay into Court the one year's net income of Rs. 1,600-7-4 as aforesaid."

C.M.A. No. 375 of 1931 was allowed and not dismissed as contemplated by the security bond but there was a Letters Patent Appeal against the decision of the learned Judge who decided the Civil Miscellaneous Appeal and that Letters Patent Appeal was also allowed so that the ultimate decision was in favour of the first plaintiff though the decision in the Civil Miscellaneous Appeal was against him. The first plaintiff sought to enforce the security bond. The learned Judges felt that the terms of the bond were absolutely explicit, that the bond definitely said that if a particular appeal (the number of which was given) was decided in favour of the first plaintiff the executant of the bond shall pay money into Court and that there was nothing in the language of the bond which extended the liability to the contingency of a further appeal against C.M.A. No. 375 of 1931.

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1. (1932) 63 M.L.J. 85 : 55 C.L.J. 413 (P.C).
2. (1934) I.L.R. 61 Cal. 890.
3. (1941) 1 M.L.J. 281.
4. (1934) 68 M.L.J. 339 : L.R. 62 I.A. 23 : I.L.R. 59 Bom. 180 (P.C.).
5. (1862) 4 De G.F. and J. 367 at 376.
6. (1939) 1 M.L.J. 557 : I.L.R. (1939) Mad. 290.

The decision of King, J., in *Dharmapuram Mutt* v. *Mohamed Usman Sahib*[1] was given on facts which closely resemble the facts in *Paramasivam* v. *Ramaswami*[2]. In *Dharmapuram Mutt* v. *Mohamed Usman Sahib*[1], the security was given against the possible alteration of the decision of the lower Court in this number (in Tamil) obviously meaning in the appeal on the file of the District Court in which the bond was given. It was decided that the obligation that was undertaken did not cover the possible contingency of a Second Appeal in the High Court and the alteration of the decree of the trial Court on such Second Appeal. In *Veerasalingam* v. *Subbarayudu*[3], it was held that the liability of the sureties conditioned on a success of the defendants in the appeals preferred by them did not arise when one only of the defendants succeeded and that the word " defendants " could not be read as meaning the defendants or either of them. To the same effect was the decision in *Venkanna* v. *Sanyasayya*[4], where security was given " for any amount that may be decreed in the plaintiff's favour in the said suit againtst the defendants." A decree was passed against one of the defendants but the suit was dismissed against the other and it was held that the security was not available. In *Muhammad Yusaf* v. *Ram Gobinda Ojha*[5], a surety undertook that he would be liable to pay the decretal amount in the event of a decree being passed in the suit if the money could not be realised from the judgment-debtor. There was a reference of the suit to arbitration and in terms of the award which followed the Court decreed the suit. When the decree-holder sought execution against the surety to realise the decretal amount it was held that the surety was discharged as there was no decree on contest by the Court. It is unnecessary for us to say whether or not a decree passed in terms of an award given on a reference of the suit itself to arbitration is a decree passed in the suit. It is enough to say that the learned Judges in that case held on a construction of the bond before them that a decree passed in terms of an award was not such a decree as was contemplated by the terms of that bond. There is no general principle gatherable from this decision which can be applied to the circumstances of the present case.

It is true that a security bond should be strictly construed according to its terms but it seems to us that the real meaning and effect of this rule are very often misunderstood. In our opinion the true position is this. If it is reasonably clear that the contingency in which the bond is sought to be enforced would not fall within the language of the condition it is not permissible to override that language in the light of what the parties intended if they did not succeed in expressing that intention in suitable language. If, on the other hand, on a fair reading of the bond in the light of the surrounding circumstances—the most important of such circumstances being the order pursuant to which the security is given—the Court considers that the contingency in which the security is sought to be availed of falls reasonably within the language of the condition which is sufficiently wide to comprehend it, there is no rule compelling the Court to adopt the stricter of two constructions to both of which the language may be susceptible.

We are inclined to hold that the security bond if interpreted in the light of the order of the High Court to which it refers and which it purports to effectuate and carry out, would cover a partial allowance of the appeal as much as its total allowance. There can be no doubt that both cases were contemplated by the order of the High Court and if the security bond is read along with that order and considered in the light of it there is no reason to put a strict interpretation on the wording of the security bond so as to hold that it meant only to provide for the appeal being allowed in its entirety.

Two further questions are raised in the appellant's behalf. The learned District Judge held that there must be a deduction of five per cent. out of the collections made by the receiver in respect of the forests over which the third defendant held a lease. The appellant's counsel argues that the customary allowance in such cases

1. (1940) 2 M.L.J. 831.
2. (1939) 1 M.L.J. 557 : I.L.R. (1939) Mad. 290.
3. (1939) 2 M.L.J. 282.
4. (1937) 47 L.W. 84.
5. (1927) I.L.R. 55 Cal. 91.

is ten per cent. and that ten per cent. should be allowed even in the absence of any evidence about the expenses incurred in realising the amount claimed by way of mesne profits and in support of this argument he relies on the decision of the Judicial Committee in *Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhuri*[1], which follows an earlier judgment of the Board in *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*[2]. This percentage was allowed in a judgment of this Court in *Krishnayya Rao* v. *Maharaja of Pithapuram*[3]. In a decision of another Bench of this Court reported in *Dhara Rama Subbayya* v. *Annavarappu Lakshminarasimham*[4], it was however held that the rule as to the ten per cent. recognised in *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*[2] and *Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhuri*[1] is based on a well-recognised practice in the Courts of Bengal and that there is no such practice in the Courts of this province. It will be noticed that in *Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhuri*[1], the judgment of the Board was delivered by Sir John Wallis who had considerable experience of the working of the Courts of this province and that it is stated in the judgment that "in India" ten per cent. is the customary allowance for collection charges in assessing mesne profits. It is however unnecessary to decide whether the principle of the rule laid down in the decisions of the Judicial Committee is or is not applicable to cases arising within our jurisdiction. In our opinion the rule as to ten per cent. is not an inflexible rule applicable to all cases regardless of the circumstances governing the realisation of the amounts claimed by way of mesne profits. Where evidence is available as to expenses actually incurred in the process of collection there will not of course be any difficulty, the amount actually spent being in the absence of any evidence that it was excessive or extravagant, a legitimate and permissible deduction. Even in the absence of any material to show the actual expenditure of realisation there is no reason why the Court should not take into consideration the comparative ease or difficulty of collection in any particular case and why the percentage allowed by way of collection charges should not accordingly be adjusted. The learned District Judge has quite rightly pointed out that all that the receiver had to do in the matter of realising the mesne profits now claimed by the lessee was to put up the leasehold right to auction, receive the lease amount from the successful bidder and deposit it into Court and that it would therefore be unreasonable to allow for collection charges anything like ten per cent. In his view the actual charges would be about Rs. 70 or Rs. 80. He has however allowed five per cent. on collection on the analogy of what is permitted to the Official Receivers in respect of their realisations. In support, the learned District Judge points out that it is not practicable in this case to fix that part of the costs of administration which can be properly attributed to the transaction in which the lessee is interested and that the lessee must have received some benefits of a general character from the administration of the entire jaghir being in the hands of the receiver. We consider these reasons to be valid and in our opinion they justify the assessment of the collection charges at five per cent. There is an appeal (C.M. A. No. 442 of 1944) filed on behalf of the lessee questioning the correctness of the decision of the learned District Judge in this regard and seeking a reduction of the amount to a very small figure. But for reasons just given we consider that no case has been made out either on the one side or the other for interference with the fixation of collection charges made by the lower Court.

The next point taken on behalf of the appellant is that a sum of Rs. 3,000 contributed to the War Fund out of the amounts lying in deposit in Court must be held to be a contribution made by both the plaintiff and the third defendant and that the learned District Judge was in error in treating it merely as a contribution made by the plaintiff. On the 15th November, 1941, the first and the third

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1. (1934) 68 M.L.J. 580 : L.R. 62 I.A. 53 : I.L.R. 62 Cal. 499 (P.C.).
2. (1900) 10 M.L.J. 356 : L.R. 27 I.A. 110 : I.L.R. 27 Cal. 951 (P.C.).
3. (1942) 1 M.L.J. 472 : I.L.R. (1942) Mad. 562.
4. (1945) 1 M.L.J. 70 : I.L.R. (1945) Mad. 571.

defendants signed a memorandum (Ex. P-8-*b*) agreeing to the payment to the War Fund of a sum of Rs. 3,000 out of the amount lying to the credit of the suit. This was signed also by their lawyer on 17th November, 1941. On 26th November, 1941, a formal application, I.A. No. 388 of 1941 was filed for the purpose by the plaintiff. In the supporting affidavit (Ex. P-8-*a*) the plaintiff states as follows :

> "In view of the status and circumstances of the Jadaya Goundar estate aforesaid, I fully consent to add along with the sum of Rs. 200, which had already been sanctioned but not disbursed a further sum of Rs. 2,800 and to contribute in all a sum of Rs. 3,000 (Rupees three thousand) to the Governor's War Fund aforesaid."

In the petition itself (Ex. P-8) the third defendant endorsed his consent as also the pleader for defendants 1 and 3 acting under a special vakalat. The petition was ordered and Government promissory notes of the face value of Rs. 3,000 were sold and a cheque for Rs. 3,000 out of the amount realised by the sale was paid to His Excellency the Governor's War Fund. It is noteworthy that in Ex. P-9-*c* (I.A. No. 47 of 1942 with endorsements) the application of 26th November, 1941, was described as "an application of both sides." On behalf of the respondent lessee it is argued that the contribution was one made by the plaintiff having regard to his position as jaghirdar and stress was laid on what is stated in his affidavit (Ex. P-8-*a*). On the other side appellant's counsel emphasises the fact that the amount came out of a composite fund and that the subscription was consented to by all the persons interested in that fund, and it is argued that the intention of every body concerned in the subscription is fairly apparent, from the proceedings. The matter is not free from difficulty. While it is true that the formal application was taken out by the plaintiff alone and while there is a reference in the affidavit filed in support of that application to the status and circumstances of the Jadaya Goundar estate, it is very material to note that defendants 1 and 3 expressed their consent to the payment of the War Fund of a sum of Rs. 3,000 several days earlier. It seems to us more probable that all the parties were willing to the extent of their respective interests to have a portion of the fund utilised for a purpose which every one of them considered to be laudable. In fact it is a matter of some doubt whether the plaintiff would have subscribed so large an amount as Rs. 3,000 if he was told or he understood that the entire amount would be debited to him. The question then arises as to how the amount is to be allocated between the plaintiff and the third defendant and what portion of it should be regarded as the contribution of the latter. It would appear that at the time when the order for payment of Rs. 3,000 to the War Fund was made the pecuniary interests of the plaintiff and the third defendant in the amount then lying in Court would be almost equal taking into consideration the rents which the third defendant in any view of the case was liable to pay to the plaintiff and the collection made by the receiver from the estate other than the forest area. The first defendant also consented to the payment of the subscription but that does not mean that the plaintiff, the first defendant, and the third defendant have each individually to contribute a third of the amount of Rs. 3,000. The plaintiff and the third defendant were fighting about the jaghirdar's interest. The more reasonable interpretation seems to us to be that the jaghirdar's interest and the lessee's interest should both contribute for the payment of that amount. The plaintiff has succeeded to the right of the jaghirdar and therefore will be liable in respect of Rs. 1,500 and the third defendant must be held to have contributed a like sum as the composite fund was divisible in almost equal shares, between the interests of the jaghirdar and the lessee at the time when the subscription was sanctioned. The learned District Judge held that no part of the Rs. 3,000 should come out of the amount payable to the third defendant but for reasons given above we do not agree with him. There must therefore be a deduction of Rs. 1,500 out of the amount to which the third defendant has been declared to be entitled. To this extent alone the appeal is allowed.

The appellant and the first respondent will pay and receive proportionate costs in C. M. A. No. 389 of 1944 and in the Court below. C. M. A. No. 442 of 1944 is dismissed with costs.

K. S. ——— *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Arumugha Mudaliar and others .. *Petitioners.**

Criminal trial—Committing Court—Power to appreciate evidence and discharge accused.

It cannot be said that in no case is the Committing Court justified in taking upon itself the duty of appreciating evidence. There are cases in which it can appreciate evidence and discharge the accused. If the Committing Courts were merely to act as post offices the provisions of the Chapter relating to preliminary inquiry in which accused persons are allowed to examine defence witnesses would not have found a place there.

The procedure to be followed in scrutinising and appreciating evidence in a preliminary register case is different from that to be adopted in any ordinary warrant case or a summons case. If there is some evidence which may appeal to any Court or a jury, the Committing Court where it does not agree with that evidence should not take upon itself the duty of rejecting the same.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the orders of the Additional District Magistrate, Trichinopoly, dated 15th July, 1947, in Criminal Revision Case Nos. 15, 16, 13, 14 and 17 of 1947 respectively preferred against the orders of the Special First Class Magistrate, Trichinopoly, in P. R. C. Nos. 4, 6, 1, 2 and 7 of 1946, respectively.

N. Somasundaram and *Kailasam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—These revisions arise out of the orders passed by the learned Additional District Magistrate, Trichinopoly, setting aside the orders of discharge of the various petitioners herein passed by the Committing Court, the Special First Class Magistrate of Trichinopoly in preliminary register cases on his file. The point for consideration is the same in all the cases and therefore I propose to deal with them by a common judgment. These various petitioners and a number of others were proceeded against under the rioting and mischief sections of the Indian Penal Code and a large body of oral evidence was let in before the First Class Magistrate. On a consideration of the evidence before him, the First Class Magistrate found that there was no *prima facie* case against these accused persons which would warrant the committal of them to take their trial before the Court of Session.

The prosecution preferred revision petitions under sections 435 and 437, Criminal Procedure Code, to the District Magistrate, Trichinopoly and the Additional District Magistrate who heard the revisions took a different view from that of the First Class Magistrate, set aside the orders of discharge and has directed that all these petitioners be committed to take their trial before the same Court of Session along with others. The chief ground on which the learned Additional District Magistrate set aside the orders of discharge is that as the case was solely triable by the Court of Session the Committing Court is not justified in taking upon itself the duty of appreciating evidence. A proposition of law stated in such wide terms is not justified by the decisions of this Court, and the learned Public Prosecutor does not support this extreme view. There are cases in which the Committing Court can appreciate evidence and discharge the accused. If the Committing Courts were merely to act as post offices the provisions of the Chapter relating to preliminary inquiry in which accused persons are allowed to examine defence witnesses would not have found a place there. Therefore, I am not prepared to agree with the Additional District Magistrate in those observations. The procedure to be followed in scrutinising and appreciating evidence in a preliminary register case is different from that to be adopted in an ordinary warrant case or a summons

* Crl. R. C. Nos. 710 to 714 of 1947. 31st October, 1947.
(Crl. R.P. Nos. 604 to 608 of 1947.)

case. If there is some evidence which may appeal to any Court or a jury, the Committing Court where it does not agree with that evidence should not take upon itself the duty of rejecting the same.

Mr. Somasundaram, the learned advocate for the petitioners, invited my attention to the evidence against some of the petitioners. In certain instances their names are not mentioned in the first information report and in certain other instances only a single witness speaks about them. I do not intend to say anything more as regards these points than that there is some evidence justifying the case going to a Court of Session. That being so they were wrongly discharged by the trial Magistrate and the order of Additional District Magistrate is correct. The petitioners are on bail and will continue to be on bail until the Sessions trial is over. In these circumstances I do not wish to interfere with the orders of the learned Additional District Magistrate and therefore dismiss these petitions.

K.C. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE CHANDRASEKHARA AYYAR.

V. RM. A. S. Chockalingam Chettiar .. *Appellant**

v.

A. SP. S. K. R. Karuppan Chettiar and others .. *Respondents.*

Execution—Merger of interests—Legal representative—Intermeddler—Decree in favour of divided son—Estate of father vesting in Official Assignee—Partition arrangement—Larger assets left with son—Whether bars execution of the decree—Fraudulent transfer—Whether can be pleaded in execution.

The expression "legal representative" includes any person who intermeddles with the estate of a deceased person. But the intermeddling must involve the assumption of a representative capacity in relation to an estate and not in assertion of a claim of right adversely to the estate.

The suit was brought for recovery of moneys due to the respondent in respect of a deposit made in the Nattukottai Chetty firm of bankers, of which the respondent's father and the appellant, first defendant, were partners. The respondent's father who was divided from him died leaving his property by will to his widow who was made the second defendant. His estate however was adjudicated insolvent and the Official Assignee was made the third defendant. The defence of the appellant was that the sum credited in the name of the respondent in the books of the firm really represented *menpanam* (additional capital) advanced by the respondent's father out of joint family funds for the purposes of the business and was thus an item in the partnership account. But as it was shown that the deposit was made out of assets obtained by the respondent at a partition with his father a decree was eventually passed to the effect that "the plaintiff do recover from the defendant (appellant) personally and from the estate of the respondent's late father in the hands of the second defendant as the sole legatee of the said estate the sum of Rs. 1,15,287-5-9". In an application to execute the decree by attachment and sale of the appellant's property, the appellant contended that the respondent was not entitled to recover the deposit amount inasmuch as by virtue of the partition arrangement between the respondent and his father the former had got into possession of more than his share of the family assets. It was further contended that the respondent should under the circumstances be deemed to have intermeddled with the estate and to have thereby become a "legal representative" of the deceased, that there was a merger of interests and that therefore the respondent's decree could not be executed.

Held : The respondent cannot be said to be a "legal representative" of the deceased any more than a trespasser on his property.

The possession of excess assets by the respondent was not a matter to be decided in execution, that the existence of the assets of the deceased with the decree-holder which ought to have been pleaded as a defence in the suit was not a factor to be considered when the decree was sought to be executed and that the objection on the ground of merger of interests was unsustainable.

The existence of larger assets in the hands of the decree-holder could not be treated as an act of fraudulent preference by the deceased and that in any event the fraudulent transfer could be set aside only in a suit brought on behalf of all the creditors and could not be agitated as a bar to the execution of the decree.

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* A. A. O. No. 208 of 1942. 8th August, 1947.

Appeal against the order of the Court of the Subordinate Judge of Devakotta dated 16th February, 1942, and made in E.P. No. 298 of 1940, in O.S. No. 102 of 1934 on the file of the Sub-Court, Sivaganga.

T. R. Sundaram for Appellant.

The Advocate-General (*K. Rajah Aiyar*), *V. K. Thiruvenkatachari, R. Subramanyam* and *R. M. Halasyam* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal arises in execution of a decree for payment of Rs. 1,15,287-5-9 to the respondent passed in O.S. No. 102 of 1934, on the file of the Court of the Subordinate Judge of Devakotta.

The suit was brought for recovery of moneys due to the respondent in respect of a deposit said to have been made in a Nattukottai Chetty firm of bankers of which the respondent's father Subramanian Chettiar and the appellant, who was the first defendant in the suit were partners. Subramanian Chettiar who had become divided from the respondent died in July, 1934, before the suit was instituted, leaving his properties by his will to his widow, who was joined as the second defendant. Subramanian Chettiar's estate having been adjudicated insolvent in I.P. No. 59 of 1935 on the file of the High Court at Rangoon, the Official Assignee, Rangoon, was brought on record as the third defendant in the suit. The main defence of the appellant was that the sum of money credited in the name of the respondent in the books of the firm really represented *menpanam* (additional capital) advanced by Subramanian Chettiar out of his joint family funds for the purposes of the business and was thus an item in the partnership account. To repel this plea and to show that the deposit was made out of assets obtained by him at a family partition the respondent relied on certain partition lists [Exs. D-2, D-2 (*a*) and D-2 (*b*)], purporting to show the division and allotment of the family assets as between the respondent and his father in 1926. These documents were accepted as etablishing division of status, though they were held to be inadmissible in evidence, for want of registration, to prove the terms of the partition. The appellant's plea was accordingly overruled and a decree was passed to the effect

> "that the plaintiff do reoover from the first defendant personally and from the estate of the late A. S. P. S. Subramanian Chettiar in the hands of third defendant and in the hands of the second defendant as the sole legatee of the said estate a sum of Rs. 1,15,287-5-9."

The respondent seeks to execute the aforesaid decree by attachment and sale of certain moveable property of the appellant for realising the balance due under the decree after giving credit for payment made by the third defendant. No relief is asked for as against the second and third defendants.

The appellant's main contention in the Court below and sole contention before us was that, inasmuch as the respondent was in possession of large assets forming part of the estate of Subramanian Chettiar and as the decree was also passed against the assets of Subramanian Chettiar the decree must be deemed to have been automatically discharged to the extent of such assets held by the respondent, and that if an account was taken of those assets, they would be found to exceed in value the amount now claimed to be due under the decree. The learned Subordinate Judge refused to entertain this plea as an answer to the respondent's claim to execute the decree, and the question is whether he was right.

Mr. Panchapakesa Sastri for the appellant put the position in two ways: In the first place, it was urged that the respondent, under colour of the allotment under the unregistered documents referred to already, is in possession of considerably more than his due share of the family assets, and as these allotments have been held ineffectual, the assets held by the respondent in excess of his half share should be regarded as forming part of Subramanian's estate, that the respondent must be deemed to have intermeddled with such estate and to have thereby become a "legal representative" of Subramania and that the decree-holder having thus became a legal representative of the debtor against whose estate the decree has

been passed, there was a merger, with the result that the decree must be regarded as having been satisfied to the extent of such excess assets. We are unable to accept this contention.

It is true that "legal representative" includes any person who intermeddles with the estate of a deceased person. But assuming that the respondent is in possession of family assets in excess of his due share, such possession dates back to the ineffectual partition of 1926, long before Subramania died, and cannot therefore amount to intermeddling with the estate of a deceased person (section 2 (*ii*), Code of Civil Procedure). Again the intermeddling must involve the assumption of a representative capacity in relation to the estate and not in assertion of a claim of right adversely to the estate. The respondent holds the assets if at all in the character of an absolute owner as he obtained them in pursuance of the allotment under Ex. D-2 series which are admissible to show the character of the respondent's possession. The respondent cannot therefore be considered to be a legal representative of Subramania any more than a trespasser on his property. Furthermore, even if the respondent were to be regarded as a legal representative of Subramania in possession of the latter's assets, the decree having been passed for recovery of the amount from the estate of the late A.S.P.S. Subramanian Chettiar in the hands of the second and third defendants, these defendants alone should be regarded as the judgment-debtors against whom the decree could be executed and not any other person in possession of the assets of Subramania though such person may be one of the latter's legal representatives. See *Servaikaran* v. *Varadarajulu*[1]. This indeed was not disputed by Mr. Panchapakesa Sastri. But he suggested that when the decree-holder himself was in possession of the assets of the deceased debtor, the position would be different. We are unable to appreciate the distinction. If the decree could not be executed against a legal representative in possession of assets where the decree did not make him liable in respect of such assets, it is difficult to see how any assets of the deceased debtor in the hands of the decree-holder could be taken into account in execution of the decree.

Mr. Panchapakesa Sastri put his contention also in another way. He submitted that the family properties held by the respondent in excess of his share should be treated as having been transferred to him by his deceased father Subramania to defeat the latter's creditors who were therefore entitled to avoid the transfer and call upon the respondent to account for such assets. The appellant, who would be entitled to claim contribution in case he had to pay the entire amount remaining due under the decree, stood in the position of a creditor entitled to relief against the estate of Subramania on the analogy of a promisee under a contract of indemnity claiming to be indemnified in a *quia timet* action even before discharging the debt due to the creditor.

This far-fetched argument must fail, for, assuming, there was a fraudulent transfer of the assets by Subramania to the respondent, the assets transferred would not be assets of Subramania in the hands of the respondent, as the transfer would be operative between the parties to the transfer until it is set aside in a representative action brought on behalf of all the creditors of Subramania, as provided for by section 53 of the Transfer of Property Act, and the possession of assets by the respondent could be no answer to his claim to execute the decree.

We are also of opinion that, besides being untenable for the reasons already indicated the contention of the appellant as to the discharge of the decree by reason of the respondent's alleged possession of excess family assets attributable to Subramania's share cannot be entertained in execution. As pointed out by the Court below if the possession of such assets could automatically reduce the liability of Subramania's estate to the respondent, such reduction should have been pleaded as a defence to the respondent's claim in the suit itself, and not having been then put forward was no longer available as an answer to the claim to execute the decree after it was passed. The decision in *Sankaralingam* v. *Arumuga*[2], where

1. (1909) 19 M.L.J. 651 : I.L.R. 33 Mad. 75.
2. (1938) 2 M.L.J. 156 : I.L.R. (1939) Mad. 73.

it was held that if *A* obtained a decree against *X* who died leaving *A*, *B* and *C* as his heirs, the decree would be extinguished to the extent of *A's* share in the estate of *X*, has no application to the facts of the present case. The respondent did not come into the possession of any assets of Subramania as his heir after his death, and as already pointed out, no question of merger can arise assuming the facts to be as alleged by the appellant.

The appeal fails and is dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

Sri Rama Vilas Service, Limited .. *Appellant**

v.

The Road Traffic Board, Madras, by its Secretary .. *Respondent.*

Motor Vehicles Act (IV of 1939), sections 42, 43, 47, 48, 57, 62 and 68—Madras Government Rules, rules 147, 148 *and* 150—*Road Traffic Board and Central Board—Constitution and powers—Government Order regarding renewal of permits—Invalidity as contravening Act—Board not considering application independently on merits—Failure of justice—Remedy under section* 45, *Specific Relief Act—Provincial Government—Right to own and ply buses for hire—" Interests of public ", meaning of—Appellate authority of Government over Central and Regional Boards—Extent and nature of jurisdiction.*

The appellant company was providing road transport service in the Madras City and throughout the Madras Province for members of the public. Prior to February, 1947, the appellant held a number of permits for buses to ply for hire in a particular route in the City granted by the respondent for three years expiring on 1st May, 1947. The appellant applied on 24th February, 1947, to the respondent, namely, the Road Traffic Board, for a grant of fresh permits or for renewal of the expiring permits for the same route. It appeared that the Provincial Government had passed an order G.O. No. 3898 (Home) on 9th December, 1946, whereby the Transport Authorities were directed to issue only temporary permits as the Government intended to nationalise motor transport. Instruction (2) in the said order provided that when applications were made for new routes or new timings in existing routes that small units should be preferred to old ones. The respondent granted to the appellant only temporary permits for a period of four months, and rejected the application for a general renewal of the permits. In doing so the order specified that the respondent rejected the applications " in the interests of the public generally under section 47 (*a*) of the Motor Vehicles Act, 1939". The appellant preferred an appeal against the said order to the Central Board, namely, the Provincial Transport Authority which was also constituted by the Government under section 44 of the Act. The appellant then applied to the High Court under section 45 of the Specific Relief Act for an order directing the respondent to consider the application made in February, 1947, in accordance with the provisions of the Act and the rules made thereunder for renewal of the permits for plying buses. In refusing the appellant's application the respondent sought to apply the direction contained in G. O. No. 3898 which, however, was in direct conflict with the proviso to sub-section (2) of section 58 of the Motor Vehicles Act, which provides that other things being equal, an application for renewal should have preference over a new application for permits. The respondent stated that because of rule 150 of the rules under section 68 it was bound to give effect to all orders of the Government, inclusive of the above order and that the appellant's application was rejected on that basis. It was also shown that although the Government contemplated taking over the bus transport, the Government buses would not be ready and available for the public at the date of the termination of the appellant's permits.

Held: The Government order, G.O. No. 3898 (Home) was issued without any right or authority; the respondent Board or the Central Board were under no obligation to obey it, and rule 150 was invalid and *ultra vires*. Consequently, the respondent Board, which had purported to exercise its quasi-judicial functions by a meek submission to the orders of the Government, had violated the provisions of sections 47 and 57 of the Motor Vehicles Act, and as the appellant's application was not dealt with in the way which the Act required and there was no real consideration given to it, the appellant's sole and correct remedy was the one provided by S. 45 of the Specific Relief Act and he was entitled to an order directing the respondent to hear and determine the application for bus permits in accordance with law.

The expression " interests of the public " which is found in the Motor Vehicles Act relates to the interests of the travelling public.

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* O. S. Appeal No. 55 of 1947. 19th November, 1947.

The grant of temporary permits on the ground that the Government intended to take over the transport services and that the buses were not ready cannot be said to be "to meet a particular temporary need" within the meaning of the Act. The whole circumstance of the grant was improper in the extreme.

The Central Transport Board and the Regional Transport Board are completely independent of the Government, save that they must observe the notifications made pursuant to section 43 of the Act. The Government is neither the direct nor the ultimate appellate authority from a decision by a Regional Board. If and when the Government acts as an appellate tribunal it has judicial functions to perform which must be discharged in a proper manner, but those functions do not include giving orders to any Board which is seized of an application for renewal of permits.

Transport vehicles could be owned by the Provincial Government and there was nothing in the Motor Vehicles Act which forbade their use as buses, and when so used no permit, for them were necessary.

Decision of Kunhi Raman, J., reversed.

On appeal from the judgment and order of the Honourable Mr. Justice Kunhi Raman, dated 23rd July, 1947, and passed in Application No. 1237 of 1947 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

Dr. V. K. John of *Messrs. John and Row* assisted by *V. Sriramamurthi* for Appellant

The Advocate-General (*K. Rajah Aiyar*) instructed by Crown Solicitor and *D. Narasaraju* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against the dismissal by Kunhi Raman, J., of an application for an order under section 45 of the Specific Relief Act, analogous to the high prerogative writ of mandamus. The appellant company was the applicant; the respondent is the Road Traffic Board, Madras, which was constituted by the Provincial Government pursuant to section 44 of the Motor Vehicles Act, 1939 (hereinafter called "the Act"). Prayer (*c*) in the application solely arises in this appeal by which an order was sought directing the respondent to consider the applicant's application under section 45 of the Act, dated 24th February, 1947, in accordance with the provisions of the Act, and the Rules made thereunder, for renewal of permits for a number of buses to ply for hire as stage carriages, and that the respondent should ignore the executive order issued by the Provincial Government, Madras, in G.O. No. 3898 (Home), dated 9th December, 1946. In dismissing the application the learned Judge directed there should be no order as to costs.

The appellant company carries on business in the Province of Madras, it provides road transport services in the City and throughout the Province for members of the public; it owns 565 transport vehicles (buses and lorries), employs about 4,000 persons, and has an annual turnover of about ninety lakhs of rupees. There are prescribed routes for buses, each route has a serial number, the route concerned in this appeal being No. 16, which runs between two points within the City. A permit is required for each bus running upon a route, which is granted by the Regional Transport Authority (so designated in the Act), and is the respondent, called "The Road Traffic Board, Madras." Prior to February, 1947, the appellant held 24 permits for buses to ply for hire on route 16, granted by the respondent, pursuant to sections 42, 45, 47, 48 and 58 of the Act, for three years expiring on 1st May, 1947. By Form P.R.A. (prescribed in the Rules made under the Act) dated 24th February, 1947, the appellant applied for a grant of fresh permits, or for renewals of the expiring permits, for the same number of buses for route 16. The form of application and a cheque for Rs. 192, the fees payable, were sent to the respondent with the appellant's letter, dated 26th Febuary, 1947, requesting renewal for a period of 3 years. On 7th March, 1947, the respondent Board replied stating that

"According to G.O. No. 3898, Home, dated 9th December, 1946, only temporary perm'ts will be issued in lieu of renewal of the pucca permits. If you are aggreeable to treat the cheque referred to above as fee for issue of temporary permits for the 24 buses at Rs. 8 per vehicle, necessary action will be taken."

Section 62 authorises the grant of temporary permits for a period not exceeding 4 months for the use of transport vehicles for any one of three purpose-

specified in the section; the Act does not authorise the grant of temporary permits in any other instances. On 12th March, 1947, the appellant replied that the cheque for Rs. 192 might be considered as payment of fees for temporary permits but that was done under protest and without prejudice to any action which might be taken to dispute the validity of the instruction that only temporary permits would be issued. A document headed "Proceedings of the Road Traffic Board, Vepery, Madras" dated 28th April, 1947, was sent to the appellant by the Board in which reference is made to the appellant's application for 24 buses on route 16, and another application made by it for buses on 5 other routes for renewal of city stage carriage permits; the document records an "order" that

"The Board considered the applications from Sri Rama Vilas Service, Ltd., for renewal of their primary stage carriage permits, as detailed below, and rejected the applications in the interests of the public generally under section 47 (*a*) of the Motor Vehicles Act, 1939;"

details of the applications are then given. Section 47 (1) (*a*) of the Act provides that the Regional Transport Authority (the respondent) shall, in deciding whether to grant or refuse a stage carriage permit, have regard to the interest of the public generally. The proceedings, by way of an application under section 45 of the Specific Relief Act, out of which this appeal arises, were instituted on 28th April, 1947, the date of the respondent's intimation of rejection sent to the appellant. Pursuant to section 64 and to rule 147, an appeal lies from a decision of the Road Traffic Board (Regional Transport Authority) to the Central Board (Provincial Transport Authority, also constituted by the Provincial Government under section 44); the appellant preferred an appeal under rule 147 against the dismissal of its application for permits for 3 years; that appeal has not yet been heard, since it awaits disposal of the present appeal before it is to be decided.

It is now convenient to refer to the relevant provisions of the Act and the rules made thereunder:

"Section 42. (1) No owner of a transport vehicle shall use or permit the use of the vehicle in any public place save in accordance with the conditions of a permit granted or countersigned by a Regional or Provincial Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used.

(3) Sub-section (1) shall not apply—

(*a*) to any transport vehicle owned by or on behalf of the Central Government or a Provincial Government other than a vehicle used in connection with the business of an Indian State Railway.

(*h*) Subject to any prescribed conditions, to any transport vehicle owned by the Government of an Indian State or French or Portuguese bounded by India, used for Government purposes unconnected with any commercial enterprise.

Section 43. (1) A Provincial Government, having regard to—

(*a*) the advantages offered to the public, trade and industry by the development of motor transport, and

(*b*) the desirability of co-ordinating road and rail transport, and

(*c*) the desirability of preventing the deterioration of the road system, and

(*d*) the desirability of preventing uneconomic competition among motor vehicles and after having heard the representatives of the interests affected and having consulted the Provincial and Regional Transport Authorities concerned, may, by notification in the Official Gazette,

(*i*) prohibit or restrict throughout the province or in any area or on any route . . . . the conveying of long distance goods traffic generally, or of prescribed classes of goods, by private or public carriers;

(*ii*) fix maximum or minimum fares or freights for stage carriages and public carriages to be applicable throughout the province . . . .

Section 44. (1) The Provincial Government shall . . . . . constitute for the Province a Provincial Transport Authority. . . . . and shall . . . . constitute Regional Transport Authorities . . .

(2) A Provincial Transport Authority or a Regional Transport Authority shall consist of such number of officials and non-officials as the Provincial Government may think fit to appoint; but no person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed as or continue as a member of a Provincial or Regional Transport Authority, and, if any person being a member of any such Authority acquires a financial interest in any transport undertaking, he shall, within four weeks of so doing, give notice in writing to the Provincial Government of the acquisition of such interest and shall vacate office.

Section 45. Every application for a permit shall be made to the Regional Transport Authority of the region or of one of the regions in which it is proposed to use the vehicle . . . . . .

Section 47 (1). A Regional Transport Authority shall, in deciding whether to grant or refuse a stage carriage permit, have regard to the following matters, namely :—

(a) the interest of the public generally ;

(c) the adequacy of existing road passenger transport services between the places to be served, the fares charged by those services and the effect upon those services of the service proposed ;

(e) the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services ;

and shall also take into consideration any representations made by persons already providing road transport facilities . . . . . .

Section 48. A Regional Transport Authority may, after consideration of the matters set forth in sub-section (1) of section 47,

(a) limit the number of stage carriages or stage carriages of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region ;

(c) regulate timings of arrival or departure of stage carriages whether they belong to a single or more owners ;

Section 57. (3) On receipt of an application for a stage carriage permit . . . . the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date not being less than thirty days from such publication on which, and the time and place at which, the application and any representations received will be considered. .

(5) When any representation such as is referred to in sub-section (3) is made, the Regional Transport Authority shall dispose of the application at a public hearing at which the applicant and the person making the representation shall have an opportunity of being heard either in person or by a duly authorised representative.

(7) When a Regional Transport Authority refuses an application for a permit of any kind it shall give to the applicant in writing its reasons for the refusal.

Section 58. (1) A permit, other than a temporary permit, issued under section 62, shall be effective without renewal for such period not less than three years and not more than five years, as the Regional Transport Authority may in its discretion specify in the permit.

(2) A permit may be renewed on an application made and disposed of as if it were an application for a permit.

Provided that, other conditions being equal, an application for renewal shall be given preference over new applications for permits.

Section 62. A Regional Transport Authority may at its discretion, and without following the procedure laid down in section 57, grant permits to be effective for a limited period not in any case to exceed four months, to authorise the use of a transport vehicle temporarily

(a) for the conveyance of passengers on special occasions such as to and from fairs and religious gatherings, or

(b) for the purposes of a seasonal business, or

(c) to meet a particular temporary need . . . . .

Section 64. Any person—

(e) aggrieved by the refusal of renewal of a permit, may, within the prescribed time and in the prescribed manner, appeal to the prescribed authority who shall give such person and the original authority an opportunity of being heard.

Section 68. (1) A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter :

(2) Without prejudice to the generality of the foregoing power, rules under this section may be made with respect to all or any of the following matters, namely :—

(a) the period of appointment and the terms of appointment of and the conduct of business by Regional and Provincial Transport Authorities and the reports to be furnished by them ;

(b) the conduct and hearing of appeals that may be preferred under this Chapter ; the fees to be paid in respect of such appeals and the refund of such fees."

Pursuant to section 68 the Madras Provincial Government made rules in which the Regional Transport Authority is called "The Road Traffic Board" and the Provincial Transport Authority, "The Central Board". The relevant rules are :—

Rule 147.—From every original decision of the Road Traffic Board an appeal shall lie to the Central Board within 30 days of the date of communication of such decision.

Rule 148.—From every original order passed by the Central Board there shall be an appeal to the Government within 30 days of the date of communication of such order.

Rule 150.—The Road Traffic Board and the Central Board shall in all matters be subject to the orders of the Government and shall give effect to all orders passed by the Government whether on appeal or otherwise.

The Provincial Government, as required by section 44, duly constituted the respondent Board and the Central Board and, by rules 147 and 148, it prescribed the appellate authorities under section 64. By those rules, an appeal lies from a decision of the respondent Board to the Central Board but no further appeal lies from a decision in appeal given by the latter Board. Applications for permits and their renewals in respect of City buses are made to the respondent Board. The personnel of the respondent Board is five in number, four officials and one non-official.

Before discussing the matters arising in this appeal it is convenient to set out G.O. No. 3898 dated 9th December 1946, to which reference is made in the letter dated 7th March, 1947, from the respondent Board to the appellant and which, in the appellant's application under section 45 of the Specific Relief Act, it is sought should be ignored by the respondent Board.

"GOVERNMENT OF MADRAS.

Abstract.

Motor Vehicles—Transport Services—Issue of Permits—Instructions.

G.O.No. 3898. *Dated* 9*th December*, 1946.

Read the following :—

G.O. No. 187, Home, dated 26th January, 1943.

G.O. No. 1467, Home, dated 7th May, 1945.

Memorandum No. 34857-B/46-1, Home, dated 9th August, 1946.

Telegram No. 34857-B, Home, dated 2nd September, 1946.

ORDER.—In G.O. No. 1467, Home, dated 7th May, 1945, Government laid down that in future bus operators should be fleet owners having not less than 20 buses and under paragraph 2 of G.O. No. 187, Home, dated 26th January, 1943, the existing operator on a route should be given preference for providing any additional service on the route. These orders have created a system of monopolies and in the opinion of the Government, this monopolistic working of the bus traffic has not been to the advantage and convenience of the travelling public. G.O. No. 187, Home, dated 26th January, 1943 (paragraph 2) is accordingly cancelled and G.O. No. 1467, Home, dated 7th May, 1945, is hereby modified so as to require that each operator should have at least 3 buses and the resources and equipment necessary to run the service efficiently. The following further instructions are also issued for the guidance of the Transport Authorities :

(1) No bus unit now operating should have a monopoly for any area or route. The transport authorities may give further convenient timings in old routes to new units.

(2) When applications are made for new routes or new timings in existing routes new and small units may be preferred to old ones.

(3) Further permits should be issued with due regard to existing numbers of buses actually running and the condition of the road to be operated upon.

(4) In town and city services no permits should be given for taking buses through narrow streets.

(5) All permits to be given for buses for the present should be only temporary as Government intends to nationalise motor transport and want to inform all motor vehicle owners about this fact and the possible termination of their services in due course. A temporary permit should however be granted only by the Transport Authority and not by its Secretary and the application should be notified and representations heard as in the case of regular permits. This applies to all permits which have expired by virtue of notices issued under the Defence of India Rules as well as to renewal upon expiry of permits held by fleet owners.

2. Permits to be issued or renewed for lorries should also be temporary and subject to the conditions specified in paragraph 1 (5) above."

At this juncture it is convenient to record that, whilst this appeal deals solely with the appellant's application for 24 permits for buses on one route in Madras City, nevertheless, vital interests of a large number of bus proprietors in the province are concerned with the subject-matter of the appeal and are dependent upon the decision. It was stated by Dr. John, for the appellant, and it was not disputed, that ever since December, 1946, when the Government issued G.O. No. 3898, not a single application, of which there were many, for bus permits including renewals of existing permits, was granted by any Regional Transport Board ; grants of temporary permits alone have been made.

Undoubtedly, and it was not argued to the contrary, G.O. No. 3898 was an order given by the Provincial Government, *inter alia*, to the Regional Transport Authority, the respondent in this appeal. Instruction (2) is in direct conflict with the proviso to sub-section (2) of section 58 which enacts that, other conditions being equal, an application for renewal *shall* be given preference over a new application for permits. Instruction (5) also ignores a statutory enactment since it forbids the grant of permits under section 58 and directs that temporary permits, under section 62 alone were to be granted ; that instruction is to be followed even when an application for renewal of a permit is made by an existing permittee who, the Act enacts, must be given preference over applicants for new permits, if other conditions are equal. The sole aim and object of the G.O. No. 3898 was ultimately to accomplish the removal of all buses, then in operation and owned by private transport undertakings, from the road so as to enable buses, which the Government proposed to own but had not acquired when the G.O. was made, to take their places and to be free of competition. The effect of the order would be to put those proprietors out of businesses : that effect is emphasised by the direction in the G.O., that preference should be given to new proprietors (units) owning few buses. But, whether new or old proprietors, only temporary permits should be granted whereby competition would be avoided with the Government's buses, if and when acquired. That aim and object was, as the G.O. states, to further the intention of the Government "to nationalise motor transport." The achievement of that aim and object was to be attained by the Government giving orders to a statutory body directing it how and in what manner it should deal with applications for bus permits. The statutory body, to whom those orders were given is one upon which the Act confers powers to exercise judicial or quasi-judicial functions when dealing with applications for permits and, in that behalf, requires that statutory body to follow the procedure and to pay regard to certain matters and to consider those applications in accordance with provisions contained in the Act and, it must follow, not otherwise.

In the affidavit of Mr. A. R. Jakeman, the secretary of the respondent Board, it is stated, in paragraph 3, that under the provisions of rule 150, the respondent Board and the Central Board are subject to the orders of the Government and are bound to give effect to all orders passed by the Government, whether on appeal or otherwise ; paragraph 4 adds that it was incumbent upon the respondent, in pursuance of the ordes contained in the Government Order, dated 9th December, 1946, to issue temporary permits and that the issue of "pucca" permits would be to set at nought the Government Order which was lawfully made in pursuance of the powers conferred on the Government by rule 150 : paragraph 7 states that the tribunals (Road Traffic Board and the Central Board) are bound to obey the lawful orders of the Government passed in pursuance of powers reserved to it by the Act and the Rules.

At the date when G.O. No. 3898 was issued the Provincial Government was in course of inaugurating a transport business, to acquire buses and to use them on the roads and streets in the City and Province for which it did not intend to obtain permits on the ground that sub-section (3) of section 42 exempted it from the provisions of sub-section (1) of that section requiring permits to be obtained by an owner to use transport vehicles in any public place. In paragraph 2 of Mr. Jakeman's affidavit, it is stated that in view of the fact that the Government of Madras had already taken a decision with reference to transport service and as the particulars relating to such scheme had (when the affidavit was sworn on 6th May, 1947) not yet been finally worked out, Government was not in a position to take over such service as and from 1st May (on which date, as above stated, the appellant's permits expired); the respondent therefore sanctioned temporary permits to the appellant in view of the abovesaid temporary need, under the order of Government. The temporary need, abovementioned, is stated, in paragraph 4, to be the necessity for continuing the bus services in the City without any dislocation, in respect of which need temporary permits could be granted pursuant to clause (*c*) of section 62.

The several statements in Mr. Jakeman's affidavit amount to this. The appellant had placed a number of buses on the roads for which permits had been granted in 1944 for three years expiring on 1st May, 1947 ; whilst the appellant's application for renewals should be given preference over new applications, pursuant to the proviso to sub-section (2) of section 58, but since the Government intended placing buses on the road, which were to be substituted for the appellant's buses, in anticipation of that intention, the appellant's application for renewals could not be granted, because the respondent Board was ordered by the Government to refuse the application for renewal of permits under section 58 (1) (requiring a grant for a minimum period of 3 years) and was bound to grant temporary permits only under section 62 (for a maximum period of four months) because the Government's buses would not be ready and available for the convenience and need of the public at the date of the expiration of the appellant's permits. The respondent Board was bound to obey the order of the Government and to carry out its directions in furtherance of its intentions, by virtue of the provisions in the Act and Rules. Further, the non-availability of the Government buses, when the appellant's permits expired, occasioned a particular temporary need within clause (*c*) of section 62 and the grant of temporary permits met that need.

The points which have been argued in this appeal and which arise for consideration are whether :

1. The Provincial Government can be proprietors of buses plying for hire either with or without permits under the Act ?

2. (*a*) Rule 150 of the Rules made by the Provincial Government, is valid and within its rule-making power contained in section 68 (1) ?

(*b*) The respondent Board must act in accordance with the orders of the Provincial Government ?

(*c*) G.O. No. 3898 has any legal warrant or authority and its terms must be obeyed by the Board ?

3. The dismissal by the respondent Board of the appellant's application was in accordance with law ?

4. The appellant has another and a sufficient remedy so as to disentitle it from recourse under section 45 of the Specific Relief Act ?

Dr. V. K. John contended that the Provincial Government cannot use a stage carriage upon the highway to ply for hire ; it cannot do so without obtaining a permit, neither can it apply for a permit so to do. Reference was made to several sections of the Act which, it was argued reflect an impossibility of such use. It was pointed out that a Provincial Government is the authority empowered by section 43 (1) to decide the matters therein specified, including the desirability of preventing uneconomic competition among motor vehicles, and to issue orders, by notifications, with regard to those matters. Thus, the contention was, the Government cannot, at the same time, be the proprietor of motor vehicles, in respect of which it has to make such decisions and issue notifications. The powers conferred upon the Government by section 43 (1) relate to transport vehicles, and their use, as a whole, and not to any particular vehicles or their ownership ; any decision made and notifications issued must be with respect to all buses and other kinds of transport and must apply to all proprietors. Next, it was pointed out, that section 44 (1) mandatorily requires the Government to constitute a Provincial Transport Authority and Regional Transport Authorities ; sub-section (2) specifies the personnel of those bodies, consisting of officials and non-officials, and prohibits a person, who has a financial interest, whether as proprietor, employee or otherwise, in any transport undertaking, from appointment as a member of those bodies ; it was argued that, if a Provincial Government owns a transport undertaking, its officials are employees and, as such, are thereby disqualified, from membership of those bodies and, thus, the provisions of the Act cannot be carried into effect since officials cannot be appointed as members.

Whilst the employees of a transport undertaking are disqualified, it would be carrying to the extreme that disability against all officials, *e.g.*, a Forest Officer, a Collector of a District or a Hospital Medical Officer, of a Government owning such undertaking in respect of those officials who are unconnected with it. The two Boards are statutory bodies of which a Provincial Government is the consti-

tuting authority: when it has discharged its power by constituting those Boards and made rules relating to appointments to them it has discharged its functions in that connection and the Boards must then be left in the performance of the duties cast upon them by the Act. Regarding the right of a Provincial Government to own buses and to use them without permits, it was argued that a decision by a Regional Transport Board, under section 47 (1), regarding, for instance [clause (*c*)] the adequacy of existing road passenger transport, and the exercise of the power, under section 48 (*a*), limiting the number of stage carriages, would be unavailing if the Government could place as many buses on the road as it liked and disregard the Board's decision and limitation. Similar objections were suggested regarding contract vehicles, *e.g.*, taxi-cabs, the subject-matter of sections 49, 50 and 51 of the Act. The statutory provision, requiring permits to use transport vehicles, is contained in sub-section (1) of section 42. Sub-section (3) of that section enacts that sub-section (1) shall not apply [clause (*a*)] to *any* transport vehicle owned by or on behalf of the Central Government or a Provincial Government other than a vehicle used in connection with an Indian State Railway. The concluding words of the clause clearly relate to the Central Government, since no Provincial Government owns a railway. The exception in clause (*a*) is expressed in unambiguous language and relates to *any* transport vehicle owned by a Provincial Government. Clause (*h*) of sub-section (3) is instructive and of assistance in the ascertainment of the meaning and effect of clause (*a*). Clause (*h*) exempts from the provisions of sub-section (1) of section 42 any transport vehicle owned by the Government of an Indian State or French or Portuguese Settlement used for Government purposes *unconnected with any commercial enterprise.* The five concluding words are absent from clause (*a*): if it had been intended to limit the exemption in that clause, to the same extent as the exemption in clause (*h*), those words would have been included; the absence of them reflects there was not the same intention regarding a transport vehicle to which clause (*a*) applies as there was to one covered by clause (*h*). If Dr. John's argument be correct, then the words in clause (*a*) " other than a vehicle used in connection with the business of an Indian State Railway " must be presumed or inferred to include the words " and in connection with any commercial enterprise " or words to a like effect. There is no warrant or reason for any such presumption or inference, more especially in light of the presence of those words in clause (*h*) and the absence of them in clause (*a*). There may be anomalies and peculiarities, pointed out by Dr. John, which arise when a Provincial Government owns and uses stage carriages on the highway and, perhaps, such state of affairs was not envisaged when the Act was passed. Be that as it may, the terms of clause (*a*) of sub-section (3) are wide and the exception to the application of sub-section (1) of section 42 is with respect to *any* transport vehicle owned by a Provincial Government. Transport vehicles can be owned by a Provincial Government and, in my view, there is nothing in the Act which forbids their use as buses and when so used, no permits for them are required. It is to be observed that, in respect of transport vehicles owned by a Provincial Government, section 42 (1) alone is made applicable but not any other provisions of the Act. The observation of Chagla, J., in *Lady Dinbai Petit* v. *M. S. Noronha*[1] can be quoted in this connection; at page 271, he said

> " The parties here . . . . . . is not the Crown but it is the Government and fortunately these Courts are not Government Courts. If the King is expected to respect the decision of the Courts, much more so are we entitled to expect that Government would respect the decision of the Court."

Substituting, for the words " decision of the Court ", the words " Motor Vehicles Act ", the observation is peculiarly in point in the present instance.

I come, now, to consider the validity of rule 150 and the matters connected with it, including G.O. No. 3898. Section 68 (1) empowers the Provincial Government to make rules *for the purpose of carrying into effect* the provisions of Chapter IV (sections 42 to 68) of the Act. The Central Transport Board and a Regional Transport Board are statutory bodies endowed with judicial or quasi-judicial

1. (1946) 48 Bom.L.R. 255.

functions. Section 44 empowers a Provincial Government to constitute those bodies and section 68 (2) (*a*) and (*b*) empower it to make rules with respect to the period and terms of appointment and the conduct of business by the Boards. The learned Advocate-General, on behalf of the respondent Board, conceded, quite properly, that the rule-making power, regarding conduct of business, does not enable the Government to direct the Boards when they dispose of their business. Section 43 (1) is the only section which empowers the Government to order, by means of a notification, any act to be done or performed; that power can only be exercised after due enquiry and is limited to prohibiting long distance goods traffic and fixing maximum and minimum fares and freight: sections 65 and 67 empower the Government to make rules and regulations relating to the working hours of drivers of vehicles and the conduct of drivers and passengers; and section 68 empowers the making of rules, for the purpose of carrying into effect the provisions of the Act. Nowhere in the Act is there any express provision by which the two statutory Boards must act in accordance with the orders of the Government and there is nothing in those three sections, nor elsewhere in the Act, from which it can be implied that the Government can, by order, direct the two Boards in the exercise of their judicial and other functions. The Boards are completely independent, unfettered by the Government save that they must observe notifications made pursuant to section 43. That independence of action is essential for the proper discharge of their statutory duties and, indeed, in the interests of justice. If, as rule 150 provides, the two Boards "shall" be subject to the orders of the Government in all matters, their functions would cease to be independent or, indeed, operative, and they could not discharge their statutory duties, *e.g.*, a Regional Transport Authority holding an enquiry under section 57 (5) as a judicial or quasi-judicial tribunal. In that circumstance the Board would be merely a conduit-pipe to convey the orders of the Government, *e.g.*, to notify an applicant for permits that the Government forbade their being granted, which, in effect, is what took place in the present instance.

The learned Advocate-General sought to place some reliance upon the concluding words of rule 150 "whether on appeal or otherwise" pointing out that, under rule 148, the Government is the appellate tribunal. Consequently, it was contended, it could give orders to the two Boards. It is, however, to be observed that the Government is neither the direct nor the ultimate appellate authority from a decision by a Regional Board. I am quite unable to follow the argument; if and when the Government acts as an appellate tribunal, it has judicial functions to perform which must be discharged in a proper manner, but those functions do not include giving orders to any Board, neither the Board from whose decision a person aggrieved may have a right of appeal to the Government nor a Board whose decision is not subject to appeal to the Government. At the same time, it was conceded that the sole rescript for G.O. No. 3898 is rule 150. That order contains no reference whatever to matters of appeal; and, as pointed out already, it contains express instructions which directly conflict with the provisions of the Act. The power conferred by section 68, to make rules, is solely for the purpose of carrying out the provisions of the Act; it must follow that the rules can be used only for the same purpose. A rule must not be made or used to obstruct and prevent those provisions from being operative. In my view, and I have no doubt, rule 150 is not within the rule-making power under section 68 and it is invalid and *ultra vires* and without any force or effect.

In regard to G.O. No. 3898 the authority, namely, rule 150 by which its correctness and its validity were sought to be established, is itself invalid. The mischief which the G.O. has occasioned is manifested when it is remembered that a Regional Transport Board has not considered, on its merits and in accordance with the Act, a single application for a three years' or five years' permit and has granted none ever since the G.O. was issued in December, 1946. An examination of the records of the respondent Board, which were placed before us by agreement between counsel, reflect that many applications made after December, 1946, were summarily

rejected solely on the ground of the instructions contained in the order. The intention of the G.O., reflected by its terms, was that applications for "*pucca*" permits should be refused peremptorily since it directed that only temporary permits should be granted; that was to deny applicants the right, conferred upon them by the Act, of having their applications considered on the merits and in accordance with the statutory provisions, after the prescribed procedure had been followed. The learned Advocate-General suggested that G.O. No. 3898 was issued in the interests of the public, but there is an entire absence of any reference to those interests in it. The expression "interests of the public", which is found in the Act, relates to the interests of the travelling public, for whose convenience and need stage carriages are provided. The manner in which the interests of that public were benefited by the G.O. was not explained.

In my opinion the G.O. was issued without any right or authority and it was naked of any legality and the Boards were under no obligation to obey it.

The dismissal of the applicant's application by the respondent Board has now to be examined. Sub-section (3) of section 57 prescribes the procedure to be observed by a Regional Transport Authority on receipt of an application for a stage carriage permit; the use of the word "shall" in two places in the sub-section makes it mandatory for the prescribed procedure to be followed. Sub-section (1) of section 47 specifies the matters to which the Board must pay regard and take into consideration when deciding whether to grant or to refuse a permit; the word "shall" is, also, used in that sub-section. When dismissing the appellant's application the Board did not follow the procedure laid down by section 57 (3) and they did not pay any regard to the matters which section 47 (1) requires, both of those provisions being mandatory; and the appellant was given no opportunity of being heard, which right section 57 (5) affords to an applicant when representation is made to the Board against the grant of his application. If it could have any semblance of legality, the G.O. was a representation by the Government within the contemplation of section 57 (3) and (5). The Board's letter, dated 7th March, 1947, was, the expression of a refusal even to accept and to entertain the appellant's application, giving as the reason, G.O. No. 3898 made by the Government. This action by the Board was a gross violation of the provisions of the Act and a grave misconception of its duties and obligations. It would seem that the refusal to accept and to entertain the application must have been thought wrongful by the Board itself, since, later, there was a purported dismissal of it on 18th April, 1947, reflecting that it was then appreciated that, when once made, an application could not be refused but required disposal. The reason given for the rejection, namely, "the interests of the public", is devoid of explanation or reason and, the use of that expression was made in an endeavour to show some conformity with the provisions of the Act requiring a ground for dismissal to be stated. How it could be in the interests of the travelling public for a permit to be refused when no other transport was available—the Government's buses not being ready for service—is difficult to imagine. It is manifest that the appellant's application was dealt with solely by reference to, and after consideration of, extraneous matters and not in accordance with the requirements of the Act.

The whole circumstances connected with the disposal of the appellant's application were completely wrongful and illegal and reflect a withholding, and a denial, of right and justice. The Board did not follow the procedure laid down in section 57 (3), it did not pay regard and give consideration to the matters set out in section 47 (1), both those provisions being mandatory, and no enquiry was held as prescribed in section 57 (5) which is essential when any representation is made against the grant of an application for permits. All those provisions in the Act were ignored. The Board failed in every respect:—to carry out its statutory duties and obligations; to observe the relevant and mandatory provisions of the Act; to deal with the appellant's application as required by law; and to realise its obligations as a statutory body. The dismissal of the application was occasioned solely by a meek and supine submission to the orders of the Government contained in G.O. No.

3898. There was no consideration or disposal of the appellant's application, as the Act required, and the actual position is that it has never been heard and determined.

Although a finding upon the grant of the temporary permits to the appellant is not necessary for the purpose of the present appeal, nevertheless, a few words upon that matter are not out of place. The sole authority for grant of such permits is section 62 and only when a circumstance, therein specified exists and for no longer than four months. No attempt was made to justify the grant by virtue of clauses (*a*) and (*b*) of the section but it was argued that clause (*c*) has application. That clause enables a temporary permit to be granted " to meet a particular temporary need ". It was suggested that the " particular temporary need " was the non-availability of the Government buses at the date when the appellant's three years' permits expired on 1st May, 1947, and that need was met by granting a temporary permit for the appellant's buses to ply for hire during the period preceding the date when the Government hoped to obtain its vehicles and put them into use. Incidentally it was stated, during the course of argument, that the Government's buses had not materialised within four months of the grant of the temporary permits which have been renewed once and may be they will again be renewed. If some private enterprise, instead of the Government, had been making preparations to place buses on the road but the necessary vehicles were not expected to be ready when the appellant's three years' permits expired, it is beyond doubt that the same course would not have been taken by the Board, nor, indeed, by the Government, as occurred in the present instance. There was not a particular temporary need within the meaning of the Act which empowered the grant of temporary permits. The grant of temporary permits was misusing the provisions of the Act solely for the benefit of the Government and to prevent criticism and objection by the travelling public. The whole circumstance of the grant was improper in the extreme.

Lastly, the question arises whether there is any other and sufficient remedy available to the appellant to enable it to repair the wrong to which it has been subjected. It was contended that the appeal provided by rule 147, to the Central Board is such remedy.

Firstly, it is the case of the respondent Board that the Central Board is bound to give effect to all orders passed by Government (*vide* paragraph 3 of Mr. Jakeman's affidavit) ; that being so, then the illegality with which the appeal would be treated is manifest ; it certainly would not be effective. But that is not the sole consideration. Secondly, the respondent Board has not dealt with the appellant's application at all, as required by law. The relief under section 45 of the Specific Relief Act is analogous to that of mandamus in England and decisions of the Courts of that country, relating to mandamus are applicable in India (vide *Bannerjee* v. *Simonds*[1]). In *The Queen* v. *Bowman*[2], a decision, in an application for a justice's licence to sell intoxicating liquor, was influenced by extraneous considerations and a writ of mandamus was sought; at page 667 Wills, J., observed :

> " There has been no real hearing, and the mandamus must, therefore, go."

A decision to the same effect is found in *The Queen* v. *Cotham*[3], also relating to the grant of a justice's licence, where Wills, J., observed at page 807

> " I have no doubt that a mandamus is the proper remedy."

In *The King* v. *The Mayor, etc., of Stepney*[4], a local authority abolished the office of vestry clerk, whereupon compensation became payable to the dispossessed officer ; the local authority, feeling bound by an ascertained practice, deducted one-fourth of the amount of compensation laid down by a statute ; it was held that mandamus would lie to compel the local authority to take the facts of the case into consideration and to exercise a discretion in the matter. Convenient reference can be made, also, to a decision in India, in *Ratanshaw Nusserwanji Todiwalla* v.

1. A.I.R. 1947 Cal. 307.
2. (1898) 1 Q.B. 663.
3. (1898) 1 Q.B. 802.
4. (1902) 1 K.B. 317.

McElhinny[1]; there, a toddy tapping licence was refused in the mistaken belief that the directions or orders of the Provincial Government regarding prohibition had to be obeyed; an order was made under section 45 of the Specific Relief Act to hear and determine the application.

The appellant's application was not dealt with in the way which the Act required, the disposal of it was made solely by reference to extraneous and illegal matters, the provisions of the Act were ignored in their entirety and there was no real consideration given to the application. In my view the appellant's sole and correct remedy is the one provided by the section.

In my opinion, for the reasons given, the appeal should be allowed; the dismissal by Kunhi Raman, J., of the appellant's application under section 45 of the Specific Relief Act and his order as to costs should be set aside; the respondent Board will be ordered to hear and determine the appellant's application for bus permits, in accordance with law and in conformity with this judgment; and the appellant will be paid his costs of the appeal and of the proceedings out of which it arises.

Bell, J.—I agree.

B.V.V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Katragadda Brahmayya, minor by mother and guardian Katragadda Jagadamba and others .. *Appellants**

v.

Katragadda Balatripura Sundaramma and others .. *Respondents.*

Landlord and tenant—Agricultural land—Suit for possession—Plea in defence of acquisition of permanent occupancy rights—Onus—Inference of admission of tenancy between the parties—Applicability of rules contained in Chapter V of the Transfer of Property Act to leases for agricultural purpose—Adverse possession—Non-payment of rent for over twelve years—Effect—If affects landlord's right to recover possession.

When a defence of permanent occupancy right is raised to a claim for possession of agricultural land, there is, necessarily, an admission of tenancy between the parties since the claim to such a right could not and would not be made, save upon the basis of the position of landlord and tenant being in existence.

Ayyanars v. Peria Karuppa Thevan, (1929) 30 L.W. 583, Approved.

Whilst section 106 of the Transfer of Property Act does not apply to leases for agricultural purpose, by virtue of section 117 of the Act, nevertheless, the rules in section 106 and in other sections (sections 105 to 116) in Chapter V of the Act being founded upon reason and equity are applicable to agricultural leases. In such a case the lease would be one from year to year and a terminable one. Accordingly, where in a suit for possession of agricultural land the tenant sets up a right of permanent occupancy, the onus is on him to prove the existence of such a right and when he fails to prove it the plaintiff would be entitled to a decree in the absence of any further plea that the tenancy was not duly terminated. Nor could the want of possession on the part of the plaintiff or his predecessor in title within twelve years of the suit, based solely upon the non-payment of rent, be pleaded in bar of the suit for possession. By withholding the payment of rent, a tenant cannot place himself, in effect, in the position of a third party and assert that the relationship of landlord and tenant has thereby terminated and he has converted his occupation from a lawful one into an unlawful one so that, at the expiration of twelve years, the landlord is precluded from recovering possession of the land demised. So far as the Limitation Act is concerned, the failure by a tenant to pay rent is merely non-payment but has no other consequence apart from making the claim for arrears of rent irrecoverable for more than a period of three years prior to suit.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Aiyar, J., dated 28th August, 1946, in S. A. No. 135 of 1945 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tenali, dated 25th September, 1944, in A. S. No. 99 of 1943 preferred against the decree, dated 27th February, 1943, in O. S. No. 30 of 1940, District Munsiff's Court, Repalle.

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1. I.L.R. (1942) Bom. 259.

* L. P. A. No. 101 of 1946. 18th November, 1947.

Ch. Raghava Rao for Appellants.

P. Somasundaram and *C. V. Narasimha Rao* for Respondents.

On an order of reference dated 15th September, 1947, by the Chief Justice and Rajamannar, J., this appeal coming on for hearing, the Court delivered the following.

JUDGMENT : *The Chief Justice.*—This Letters Patent Appeal arises out of a suit in the Court of the District Munsiff of Repalle in which the plaintiff (respondent) claimed possession, rent and mesne profits in respect of two acres 59 cents of agricultural minor inam land from defendants 1, 2 and 3 (appellants 1, 2 and 3); no claim was made against defendant 4 (appellant 4) nor against defendants 5 and 6 (respondents 2 and 3) ; the last two named parties were joined, *pro forma*, as they were vendors of the land in suit to the plaintiff whose claim they supported. The learned District Munsiff dismissed the suit ; an appeal by the plaintiff to the Court of the Subordinate Judge of Tenali was allowed ; a second appeal by defendants 1 to 4 to this Court was dismissed by Chandrasekhara Aiyar, J., who, on the ground that difficult questions were involved, granted a certificate to prefer an appeal pursuant to the Letters Patent of the Court ; upon that appeal coming before a Bench, reference was made to two decisions of this Court, each given by a Bench, in *Zamindar of Parlakimedi* v. *Ramayya*[1] and *Aiyanars* v. *Periakaruppa Thevan*[2] which, it was stated, are in conflict. The appeal has been posted before a Full Bench since it is convenient for all points arising in it to be heard at the same time.

The plaintiff's case was that the ancestors of defendants 5 and 6 were absolute proprietors of the inam land in suit, the grant in their favour, at a time immemorial, being of both the kudiwaram and the melwaram rights ; by a deed of sale, dated 19th November, 1937, defendants 5 and 6 conveyed to the plaintiff those rights, together with the right to the rent in arrear due from the tenant or tenants ; at the date of the sale the father of defendant 1 was the tenant, he was in arrear with the rent for the previous three years ; after the purchase by the plaintiff, she let the land to the father, for fasli year 1346, that tenancy terminating by effluxion of time before the institution of the suit ; the land was sold at a collusive Court auction to defendant 4 and the sale deed was later executed in favour and in the name of defendant 2 as purchaser ; defendant 3 claimed to be the tenant of defendant 2 ; those transactions were not real or genuine ones and by them defendants 2 to 4 acquired no right to, or in the property in suit ; defendants 2 and 3 were trespassers upon the land. As against defendant 1 possession was claimed by virtue of the termination of the lease in his father's favour, by effluxion of time, together with rent unpaid for three years prior to the suit and, against defendants 2 and 3, as trespassers, for possession and mesne profits for a like period. No claim was made against defendant 4.

Defendants 1 to 4 each delivered a written statement but, at the trial and during the subsequent appeals, they united their causes, they were represented by the same advocate in the High Court, and they put forward a joint case, the substance of which was that the ancestors of defendants 5 and 6 were granted the melwaram right alone and not the kudiwaram right in the land, the latter right being granted to the predecessors of defendant 1 ; alternatively those predecessors acquired the kudiwaram right by prescription ; whilst it was not in dispute that the father of defendant 1 and, later that defendant, were tenants of the land, the genuineness of the two leases pleaded in the plaint was denied ; it was alleged that defendants 1 to 4 had permanent occupancy rights in the land ; and neither defendants 5 and 6 nor the plaintiff had been in possession of the land within twelve years of the institution of the suit.

In their written statements defendants 2 and 4 alleged absolute rights to the land in suit by virtue of purchases by them from persons other than defendants 5

1. (1926) 51 M.L.J. 510.

2. (1929) 30 L.W. 583.

and 6 or the plaintiff and that leasing of the land by defendants 2 and 4 to defendant 3 afforded the last defendant a right to possession.

The learned District Munsiff of Repalle held that, the ancestors of defendants 5 and 6 owned the melwaram right alone, the kudiwaram right was enjoyed by others, who were represented in the suit by defendants 1 and 2 ; the leases pleaded in the plaint were negatived ; and the plaintiff and his predecessors had not been in possession of the land within 12 years prior to the suit. On these findings the suit was dismissed.

On appeal by the plaintiff, the learned Subordinate Judge of Tenali reversed the decision of the learned District Munsiff. He found, as facts, that the inamdars (the ancestors of defendants 5 and 6) were the grantees of both warams ; defendants 1 to 4 had no permanent occupancy right by virtue either of original grant or by subsequent acquisition ; whilst the plaintiff failed to establish either of the two leases, pleaded in the plaint, nevertheless the leasing in favour of defendants 1 to 4 must be presumed to be yearly and they were liable to be evicted at the suit of the plaintiff ; regarding the plea that the plaintiff and his predecessors in title had not been in possession for more than 12 years, since defendants 1 to 4 admitted that, at one time, they (evidently meaning the predecessors-in-title of those defendants) were tenants of the inamdars, thereafter they could not deny their landlords' title and claim absolute rights without first surrendering possession to the landlord and, in the circumstances and facts, the plaintiff had not been out of possession. Accordingly the learned Judge decreed the suit.

As previously stated, an appeal by defendants 1 to 4, by way of a second appeal, to this Court, was dismissed by Chandrasekhara Aiyar, J. This Letters Patent Appeal is preferred by defendants 1 to 4 against the decision of the learned Judge.

As already pointed out, no relief was sought in the plaint against defendant 4 and, whilst the learned Subordinate Judge's judgment directs, simply, that the suit be decreed nevertheless the formal decree directs defendant 4, as well as defendants 1 to 3, to put the plaintiff in possession of the land in suit ; but, as with the latter three defendants, there is no decree against defendant 4 for Rs. 252 " past profits for the past three years." The absence of any relief having been sought in the plaint against defendant 4 evidently escaped notice during the hearing before the learned Subordinate Judge and before Chandrasekhara Aiyar, J., and no point was made before us in that connection ; throughout, it would appear, that no distinction was sought to be made between the positions of defendants 1, 2, 3 and 4.

Since the appeal to this Court from the learned Subordinate Judge was by way of second appeal, pursuant to Order 41, Civil Procedure Code, the findings of fact must be accepted. Since there was evidence supporting those findings, Mr. Raghava Rao for defendants 1 to 4 (appellants) sought to challenge the finding, that the defendants 1 to 4 had failed to prove permanent occupancy rights either by original grant or by subsequent acquisition, on the ground that the learned Judge took an erroneous view of the law leading to his disablement from weighing evenly the evidence. He cited in support of his argument, the decision by the Board in *The Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow*[1]. There, it was observed at pages 212 and 213 of the report that

> " the trial Judge had taken an erroneous view as to the law in regard to onus. His mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence."

Expressing inability to contend that the learned Subordinate Judge's mind was " coloured " by an erroneous view of the law, that contention was not pursued.

There are findings in fact that the predecessors of defendant 1 were not granted a permanent occupancy right in the lands in suit and that they acquired no such right by prescription, subsequent to the grant. In light of the latter finding it is unnecessary to consider whether, upon the question of the acquisition of prescriptive

1. (1930) 60 M.L.J. 210 (P.C.).

right of occupancy, there is conflict and, if so, its extent, in two decisions by the Board which are found in *Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi*[1] and *Nainapillai Marakayar* v. *Ramanathan Chettiar*[2].

There are some matters arising in the appeal relating to defendants 2 to 4 which are different from those relating to defendant 1 and with which it is convenient first to deal. The claim for possession against defendants 2 and 3 was as trespassers by virtue of the plaintiff's paramount title. Their answer to the claim was (*a*) purchase by defendants 2 and 4 from persons other than defendants 5 and 6, their predecessor or successor in title, and the leasing of the land to defendant 3, and (*b*) permanent occupancy right in the land with defendant 1.

As to (*a*) since defendants 5 and 6, through their ancestors, were full proprietors of the land and they owned all the rights in it, the vendors of defendants 2 and 4 had no right or title which they could convey and those defendants acquired none by their purchase and the lease to defendant 3 could confer no right upon him.

As to (*b*) assuming, however, that the vendors to defendants 2 and 4 were predecessors of defendant 1, the positions of defendants 1 to 4 were *in pari materia*; that aspect will be examined later, as also will the contention that the plaintiff and defendants 5 and 6 were not in possession of the land within 12 years of the institution of the suit. Incidentally it is to be observed, according to the pleas raised by defendants 1 and 2, and by defendant 4 who adopted the written statement of defendant 1, that the share of the father of defendant 1, was only one-fourth of the two acres 59 cents of the land in suit.

Now as to the questions which form the main substance of the argument for defendants 1 to 4, and which occasioned the reference of this appeal to a Full Bench. They arise in this way. Indubitably, the predecessors of defendant 1, from whom any right, title or interest which he possessed in the land was derived, were tenants of defendants 5 and 6 and their ancestors. According to the judgment of the learned Subordinate Judge, there was an admission of the existence of a tenancy. Even in the absence of such admission, it must be conceded, by virtue of the claim to a permanent occupancy or kudiwaram right. The owner of a kudiwaram right is the tenant of the owner of the melwaram right, using the words "landlord" and "tenant" in their widest sense. In *Aiyanars* v. *Periakaruppa Thevan*[3], Wallace, J., observed at page 588 that:

"the position that a kudiwaram holder is a co-owner with his landlord and is not a tenant is not one that has been advanced or approved so far as we know, by any decision of the Privy Council. The Privy Council case, already referred to, in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[2], proceeds throughout on the footing that one who admits he is a kudiwaramdar admits also that he is the tenant of his melwaramdar."

In the decision of the Judicial Committee, cited by Wallace, J., it was observed by their Lordships at page 344 of the report that:

"a permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies."

The correctness of the first part of the observation of Wallace, J., above quoted, regarding the absence of approval by the Privy Council of the position as co-owner, and not as tenant, of a kudiwaramdar, was stated by Venkataramana Rao, J., at page 892 in *Lakshmana Reddiar* v. *Ellinganaickenpatti Kumara Koil*[4] to be strictly not accurate in view of the observations by the Judicial Committee in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[1]. Evidently the learned Judge was referring to the quotation, with approval of it, by the Judicial Committee at page 602 of the judgment, of part of the proceedings of the Board of Revenue of Fort St. George,

1. (1922) 43 M.L.J. 640: L.R. 49 I.A. 286: I.L.R. 45 Mad. 586 (P.C.).
2. (1923) 46 M.L.J. 546: L.R. 51 I.A. 83: I.L.R. 47 Mad. 337 (P.C.).
3. (1929) 30 L.W. 583.
4. (1938) 1 M.L.J. 634: I.L.R. 1938 Mad. 888.

Madras, dated 5th January, 1818, regarding the place of the cultivating ryots in the economy of southern India. Earlier, at page 891 in his judgment in *Lakshmana Reddi's case*[1], Venkataramana Rao, J., quoted from the observations of the judgment in *Venkata Narasimha Naidu* v. *Dandamudi Kotayya*[2] relating to part of the same proceedings of the Board of Revenue which states that:

"To treat such a payment by cultivators to zamindars as 'rent' in the strict sense of the term and to imply therefrom the relation of landlord and tenant, so as to let in the presumption of law that a tenancy in general is one from year to year would be to introduce a mischievous fiction destructive of the rights of great numbers of the cultivating classes in this province who have held possession of their lands from generation to generation."

The learned Judge adds that *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[3] approved of that view and had cited the above passage as laying down correctly the place of the cultivating ryots. With very respect to the learned Judge the observations in *Venkata Subba Naidu's case*[2] relating to part of the proceedings of the Board of Revenue, are not quoted in the judgment of the Judicial Committee and the Board did not express approval of this; the approval expressed related to another passage. In addition to *Nainapillai Marakayar* v. *Ramanathan Chettiar*[4], the Privy Council have dealt with the relationship of a kudiwaramdar and a melwaramdar as one of landlord and tenant in other decisions, vide *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[3]. There is nothing which warrants criticism of the correctness of the observation by Wallace, J., above quoted, nor to throw doubt upon the position of landlord and tenant as existing between separate holders of rights to the two warams. The observations in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[4] which are quoted by Wallace, J., and are set out above, speak of a permanent occupancy right being that of a tenant which, necessarily involves a landlord and a tenancy under him; no authority has been cited, apart from the observation by Venkataramana Rao, J., which lends support to a contrary view or that the position is that of co-owners. When a defence of permanent occupancy right is raised to a claim for possession, there is, necessarily, an admission of a tenancy between the parties since a claim to such right could not and would not be made, save upon the basis of the position of landlord and tenant being in existence. I agree, respectfully, with the observations of Wallace, J., at page 588 in *Aiyanars* v. *Periakaruppa Thevan*[5].

The finding by the learned District Munsiff negativing the two leases of the land, pleaded in the plaint, to the father of defendant 1 (*a*) by defendants 5 and 6 prior to the plaintiff purchasing the property and (*b*) in June 1937 by the plaintiff for one year, was not disturbed by the learned Subordinate Judge; therefore that finding stands. That finding does not affect the position of landlord and tenant, which existed, save that the nature and tenure of the tenancy remains to be ascertained.

In this connection learned counsel for defendants 1 to 4, having pointed out that the plaintiff had failed to establish the leases of the land in suit which were pleaded in the plaint, more particularly the lease in June, 1937, contended that having failed in those respects and thereby the nature of the actual tenancy being undetermined she had failed to establish her case and was, in consequence, not entitled to an order for possession. At the same time, the learned counsel expressly disclaimed that any point was made that, upon establishment of a terminable tenancy, due determination of it had not been effected.

The argument was that when in a claim for possession, the defendant's sole answer is one of permanent occupancy right, the burden of proof in that respect being upon the defendant and in which he fails, nevertheless, the burden remains upon the landlord to establish a right to eject and the failure by the tenant to make out a plea of occupancy right does not, by itself, entitle the landlord to an order;

1. (1938) 1 M.L.J. 634: I.L.R. (1938) Mad. 888.
2. (1897) 7 M.L.J. 251 : I.L.R. 20 Mad. 299 at 302.
3. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
4. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C).
5. (1929) 30 L.W. 583.

he must prove the tenancy and show it was a terminable one. *Venkatacharlu* v. *Kandappa*[1], and the observation of Muthuswami Aiyar, J., at pages 64 and 65 in *Appa Rau* v. *Subbanna*[2], were cited in support of the proposition. Also, reliance was particularly placed upon the observation of Spencer, J., at page 561 in *Subbarayudu* v. *Narasimha Rao*[3], where he said that :

> " when a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the defendant is his tenant alleged, if that is denied, but also his right to eject. In order to prove a right to eject he must necessarily show that the tenancy is a terminable one and has been validly terminated."

In light of the concession made by Mr. Raghava Rao determination of the tenancy, when its terminable nature is ascertained, does not arise.

In *Sethuratnam Iyer* v. *Venkatachala Goundan*[4], Sir Lawrence Jenkins, in delivering the judgment of the Board, observed at page 576 that

> " the plaintiff's title was conceded, and the notice by which he purported to terminate the defendant's tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail. . . . . The burden of proof as to it lay on them."

There, the occupancy right was held to have been proved, so the plaintiffs failed to obtain an order for possession. But, although that observation was made in a case where, by reason of a concession or an admission, no consideration arose beyond the question whether the tenants were entitled to occupancy rights, it is explicitly laid down that the burden is upon the tenant to establish an occupancy right when it is pleaded as an answer to a claim to possession by a landlord. Another decision of the judicial Committee, to a like effect, is found in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[5]. Mr. Raghava Rao sought to confine the principle to a case when the landlord has, himself, put the tenant into possession and he referred to an observation by Madhavan Nair, J., at page 524 in *Zamindar of Parlakimedi* v. *Ramayya*[6], where reference is made to two decisions of the Board in *Secretary of State for India in Council* v. *Luchmeswar Singh*[7] and *Sethuratnam Iyer's case*[4] regarding the burden of proof of occupancy rights in an action for possession ; the learned Judge then points out that in each of those two cases, the tenants had been let into possession by the landlord.

In the several decisions by the Judicial Committee, where it was laid down that the burden is upon the tenant to prove an alleged occupancy right, it is not stated that that principle is confined to the instance mentioned by Madhavan Nair, J. It has been laid down in clear and unambiguous language : *Nainapillai's case*[5] says :

> " It cannot now be doubted, that when a tenant of lands in India, sets up a defence, of a right of permanent occupancy, to a claim by his landlord to eject him, the onus is upon the tenant to prove he has such right."

However, in the present case, all the evidence being before the learned Subordinate Judge he found, as a fact, that defendant 1 and his predecessors had not a right of permanent occupancy and that finding cannot be challenged and it stands.

The conflict between the decisions in *Zamindar of Parlakimedi* v. *Ramayya*[6] and *Aiyanars* v. *Periakaruppa Thevan*[8] is that in a suit where the plaintiff claims possession against which the defendant asserts a permanent occupancy right, the former decision held that upon the failure to establish the right, the plaintiff still had to prove that the letting was a terminable one and that it had been determined ; whereas the latter decision took the contrary view, holding that, upon failure by the defendant to establish the right asserted, thereupon the plaintiff was entitled

1. (1891) I.L.R. 15 Mad. 95.
2. (1889) I.L.R. 13 Mad. 60.
3. (1924) 47 M.L.J. 558.
4. (1919) 38 M.L.J. 476 : L.R. 47 I.A. 76 : I.L.R. 43 Mad. 567 (P.C.).
5. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.).
6. (1926) 51 M.L.J. 510.
7. (1888) L.R. 16 I.A. 6 : I.L.R. 16 Cal. 223 (P.C.).
8. (1929) 30 L.W. 583.

to a decree in ejectment. In *Venkateswarlu* v. *Lakshmana*[1], Horwill, J., following the *Zamindar of Parlakimedi's case*[2], took the view that the burden still remained upon the landlord of proving his right to evict but Krishnaswami Aiyangar, J., expressed the opposite opinion and preferred the decision in *Aiyanars case*[3]; by reason of the difference in the views of those two learned Judges, the matter was referred to King, J., who discussed the relevant authorities and expressed the opinion that when a tenant admits the melwaram right is vested in the landlord but claims that the occupancy right is vested in him, he must prove that right in order to defeat the claim for possession by the plaintiff, who is not required to establish the tenancy is terminable and that it has been determined.

Now returning to the present case when the property in suit is agricultural land and was let for that purpose, section 106 of the Transfer of Property Act provides that in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural purposes shall be deemed to be a lease from year to year terminable by six months' notice expiring at the end of the year of the tenancy. Whilst that section does not apply to leases for agricultural purpose, by virtue of section 117 of the Act, nevertheless, it has been observed and laid down in a series of decisions of this Court that the rules in section 106 and in the other sections (sections 105 to 116) in Chapter V of the Act are founded upon reason and equity; they are the principles of English law and should be adopted as statement of the law in India applicable to agricultural leases. (Vide *Vasudevan Nambudiripad* v. *Valia Chathu Achan*[4], *Gangamma* v. *Bommakka*[5], *Appa Rao* v. *Subbanna*[6], *Nanjappa Goundan* v. *Rangaswami Goundan*[7] and *Thirumalreddi Inna Reddi* v. *Gade Gopireddi*[8]. The first of those decisions was pronounced by a Full Bench, the second and third by Benches and the last two are each decisions by single Judges. Applying these principles to the present case, it follows that the tenancy was one from year to year and was a terminable one. Since no point is taken that, the tenancy being terminable it was not duly determined, it is manifest that the plaintiff was, in fact, entitled to an order for ejectment at the date when the suit was instituted. Therefore consideration of the conflict between the *Zamindar of Parlakimedi's*[2], and *Aiyanars'*[3], cases is not pertinent in the present instance, whichever may be the correct view, and the question does not arise whether, in the absence of termination of the terminable tenancy, the plaintiff would have been entitled to the relief which she claimed.

Lastly, there remains to be considered the plea that the plaintiff and his predecessors were not in possession of the land within 12 years of the institution of the suit, whereby the plaintiff is prevented from obtaining an order for possession. Mr. Raghava Rao disclaimed that any right, title or interest is asserted by virtue of adverse possession of the property, which was alleged in the written statements.

Admittedly the position of landlord and tenant existed, and it has been ascertained that the tenancy was one from year to year.

The contention of want of possession is based solely upon non-payment of rent. In *Jagdeo Narain Singh* v. *Baldeo Singh*[9], it was observed in the judgment of their Lordships of the Privy Council, at page 52, that

> " mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession."

In the second edition of " the Transfer of Property Act " by the late Sir Dinshaw Mullah it is stated, at page 578, that,

> " when once the relationship of landlord and tenant is established, mere non-payment of rent, is not enough to prove that the relationship has ceased ; "

1. (1944) 1 M.L.J. 160.
2. (1926) 51 M.L.J. 510.
3. (1929) 30 L.W. 583.
4. (1900) 10 M.L.J. 321: I.L.R. 24 Mad. 47 (F.B.)
5. (1909) I.L.R. 33 Mad. 253.
6. (1889) I.L.R. 13 Mad. 60.
7. (1940) 1 M.L.J. 200.
8. (1943) 1 M.L.J. 43.
9. (1922) 45 M.L.J. 460 : L.R. 49 I.A. 399: I.L.R. 2 Pat. 38 (P.C.).

a number of authorities are cited to support the statement including *Tiruthurna Perumal Nadar* v. *Sanguvien*[1], and *Jalasutram Lakshminarayana* v. *Bommadevara Venkata Narasimha Naidu*[2], which bear out the proposition. In *Bilas Kunwar* v. *Desraj Ranjit Singh*[3], the Board observed at page 567 that,

"a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord."

A landlord can recover arrears of rent which have fallen due within three years of suit but he cannot enforce, by action, payment of anterior arrears ; in case of non-payment for 12 years, no suit lies for rent unpaid during the first nine of those years. By withholding payment of rent, a tenant cannot place himself, in effect, in the position of a third party and assert that the relationship of landlord and tenant has thereby terminated and he has converted his occupation from a lawful one into an unlawful one so that, at the expiration of 12 years, the landlord is prevented from recovering possession of the land demised. So far as the Limitation Act is concerned, the failure by a tenant to pay rent is merely non-payment but has no consequence other than as above stated.

In my opinion, for the reasons given, this appeal fails. Although no relief was sought against defendant 4, throughout he has associated himself with defendants 1 to 3 and was included in issue 6 in the trial Court as to the title of all those defendants ; further he was a purchaser of part of the property in suit. In light of those circumstances the plaint will be amended so as to include him in the claim for possession and the formal decree in the Subordinate Judge's Court will remain. The plaint will be returned to the plaintiff to effect that amendment. Towards the close of his argument Mr. P. Somasundaram, for the plaintiff-respondent, stated that since his client has now obtained possession of the land in suit, an order for possession against defendant 1 has become unnecessary, but, nevertheless, I think that the order would stand ; if the plaintiff does not wish, or has no need, to enforce it, he need not do so. The plaintiff is entitled to his costs from defendants 1 to 4, Rs. 150.

Patanjali Sastri, J.—I agree.

Bell, J.—I agree.

V.S.

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI AND M. PATANJALI SASTRI, JJ.

S. Kuppuswami Rao ... *Appellant**

v.

The King .. *Respondent.*

Intervener : The Governor-General of India.

Government of India Act (1935), *section* 205 (1)—*Granting of a certificate under—If precludes Federal Court deciding as to competency of appeal—'Judgment', 'final order'—Meaning of—Same meaning to be given both in civil and criminal cases—Interlocutory order of the High Court on a preliminary objection in the course of a criminal trial—Appeal to Federal Court—Maintainability.*

When a certificate is granted under section 205 (1) of the Constitution Act, the Federal Court will not question that a dispute on the interpretation of the Government of India Act had arisen in the matter. But in order to determine that the Federal Court has jurisdiction under the provisions of section 205 (1) of the Act, it would be necessary for the Federal Court to ascertain whether the

1. (1861) I.L.R. 3 Mad. 118.
2. (1905) 16 M.L.J. 35 : I.L.R. 29 Mad. 42.
3. (1915) 29 M.L.J. 335 : L.R. 42 I.A. 202 : I.L.R. 37 All. 557 (P.C.).

* Criminal Appeal No. VII of 1947. 17th December, 1947.

appeal is really from a judgment, decree, or final order of the High Court. The certificate granted by the High Court does not preclude the Federal Court from considering that point.

The expression "final order" in section 205 (1) has to be given the same meaning both in civil and criminal cases, namely, it must be an order which finally determines the points in dispute and brings the case to an end.

The word "judgment" means, with reference to a civil case, the determination of the rights of the parties in the matter brought before the Court.

In the Criminal Procedure Code, the word "judgment" is used to indicate the termination of the case by an order of conviction or acquittal of the accused. It cannot cover a preliminary or interlocutory order in a criminal case.

The words "judgment or final order" are used in section 205 (1) of the Constitution Act and impart jurisdiction to the Federal Court to entertain appeals both in civil and criminal matters. As the same words give jurisdiction to the Court in both classes of cases, it will be improper to construe them in a certain way when applicable to appeals in civil matters and give them a wider meaning when considered in connection with appeals from criminal proceedings.

The word "final" in section 205 (1) controls the word "order" and it is an order of that nature against which an appeal could be brought to the Federal Court.

An objection to the maintainability of a criminal prosecution was raised on the ground that the consent of His Excellency the Governor was necessary under section 270 (1) of the Government of India Act, but was not obtained. It was overruled and a petition filed in the High Court to revise that order was also dismissed. On a question whether the order of the High Court was a judgment or final order against which an appeal to the Federal Court was competent,

Held, that it was not a judgment as it was only an interlocutory order made on a preliminary objection in the course of a criminal trial. It was also not a final order, as the order was not on a point which decided either way, would terminate the matter before the Court finally. Hence the appeal to the Federal Court against the dismissal of the revision petition by the High Court was not maintainable.

B. Banerji, Advocate, Federal Court, instructed by *Naunit Lal*, Agent, for Appellant.

K. Rajah Aiyar, Advocate-General of Madras (*V. Seshadri*, Advocate, Federal Court, with him), instructed by *Ganpat Rai*, Agent, for Respondent.

Sir Noshirwan P. Engineer, Advocate-General of India (*H. K. Bose*, Advocate, Federal Court, with him), instructed by *K.Y. Bhandarkar*, Agent, for the Governor-General of India : Intervener.

The Judgment of the Court was delivered by

Kania, C.J.—This is an appeal from the decision of the High Court of Judicature at Madras in Criminal Revision Case No. 1091 of 1946. The relevant facts are these.

In 1936, the appellant was the Taluk Head Accountant, Madura Sub-Treasury. By a notification dated the 28th March, 1931 and published in the local Government Gazette, amongst others, the Taluk Head Accountants in the Sub-Treasuries mentioned in Schedule 'A' thereto were appointed to exercise the powers and perform the functions of licensing officers under the Madras Motor Vehicles Taxation Act, 1931. Madura Sub-Treasury was mentioned in Schedule 'A.' A licensing officer is defined in the said Act as an officer appointed by the Provincial Government to exercise the powers and perform the functions of a licensing officer under the Act. The appellant, although not appointed specifically by name, was thus authorized to exercise the powers and perform the functions of a licensing officer.

It was alleged on behalf of the Crown that between the 1st April, 1936, and 14th October, 1936, the appellant, along with two others, conspired to commit criminal breach of trust and cheat and defraud the Provincial Government of the revenues due to it by way of motor tax on certain vehicles belonging to the Jai Vilas Motor Service, and in pursuance of that conspiracy committed criminal breach of trust by dishonestly issuing motor licences without collecting in full the amount of tax due on them and cheated and defrauded the Provincial Government of its revenues to the extent of Rs. 3,942-4-0 by causing delivery of the licences on the false representation contained in the certificate of endorsement of payment

of tax in the registration certificates of the vehicles concerned that full tax had been paid. The appellant was also charged with signing false certificates of payment of tax in the registration certificates and falsifying accounts by omitting to enter the particulars relating to such licences in the treasury accounts. On those allegations an information was filed charging the accused under sections 120 (B), 420, 468, 197, 409 and 477 (A) of the Indian Penal Code. Thereafter 37 witnesses were examined before the magistrate. After the proceedings thus went on for many days, two objections were put forward on behalf of the appellant. The first objection was on the ground that the consent of His Excellency the Governor was necessary under section 270 (1) of the Government of India Act, but was not obtained. On the 28th February, 1946, the Magistrate upheld the objection in respect of charges under sections 409, 420, 197 and 477 (A) but held that no such consent was required in respect of the charge under section 120 (B). He directed the trial to proceed on the charge under that section only. The second objection was that the proceedings were against section 197 of the Criminal Procedure Code, read with section 271 of the Government of India Act, 1935. The argument was that as the appellant was appointed to perform the duties of a motor licensing officer, he was a Government servant whose services could not be dispensed with by the District Collector. The objection would succeed if two conditions were satisfied : (1) That the petitioner was a public servant who could not be removed by the District Collector but was removable from his office only with the sanction of the Provincial Government or some higher authority. (2) He must be accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. If either condition was not satisfied, the section would not apply. That contention was rejected. A petition to revise the order was filed before the High Court. When the petition came for hearing before Kuppuswami Iyer, J., both parties agreed that evidence would be required to be taken on the contentions raised by the appellant and that the evidence was not on record. There was therefore a remand without deciding any of the questions raised in the petition. When the matter came again before the magistrate, no fresh evidence was adduced and no new arguments were advanced. The magistrate saw no ground for reconsidering the order already passed by him.

The appellant thereupon filed a petition in Criminal Revision Case No. 1091 of 1946. It was argued on his behalf that as consent of His Excellency the Governor of Madras was not obtained, the prosecution could not be launched because the evidence which was alleged to establish the charge of conspiracy, was the same evidence that would establish the charge of criminal breach of trust, etc. and as the latter charges could not be framed without the consent of the Governor, such consent was equally necessary for the charge under section 120 (B) of the Indian Penal Code. The further objection was under section 197 of the Criminal Procedure Code. Mr. Justice Rajamannar overruled both the objections of the appellant and dismissed the petition. The result of that order is that the proceedings have to go on before the Magistrate. The learned Judge, however, granted a certificate under section 205 (1) of the Government of India Act, 1935. The appellant has thereupon filed this appeal.

On behalf of the respondent, a preliminary objection was taken to the maintainability of the appeal. It is recognised that having regard to the certificate this Court will not question that a dispute on the interpretation of the Government of India Act had arisen in the matter. But in order to determine that this Court has jurisdiction under the provisions of section 205 (1) of the Government of India Act, 1935, it is necessary for us to ascertain whether the appeal is really from a judgment, decree or final order of the High Court. The certificate granted by the High Court does not preclude us from considering that point. Section 205 (1) of the Government of India Act, 1935, runs as follows :—

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty

of every High Court in British India to consider in every case whether or not any such question i involved and of its own motion to give or to withhold a certificate accordingly."

The question then is what is the meaning of "judgment, decree or final order of a High Court" in this section? The expression "final order" has been judicially interpreted and its meaning is now well settled. In *Salaman* v. *Warner*[1], Lord Esher, M.R., discussed the meaning of the expression "final order" in these terms :

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

Fry, L.J., remarked as follows :

"I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined."

Lopes, L.J., said as follows :

"I think that a judgment or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the rights of the parties."

In *Bozson* v. *The Altrincham Urban District Council*[2], Lord Alverstone, C.J., held that the real test for determining the question was :—"Does the judgment or order, as made, finally dispose of the rights of the parties?"

In *Ramchand Manjimal* v. *Goverdhandas Vishandas Ratanchand*[3], the question was in respect of a stay granted under section 19 of the Indian Arbitration Act IX of 1899. The trial Judge granted a stay, but on appeal the Court of the Judicial Commissioner of Sind reversed the order. The Judicial Commissioner granted a certificate under section 109 of the Civil Procedure Code on the footing that the order passed by him was a final order. On appeal the Judicial Committee of the Privy Council pointed out that the order in question was not a final order and the preliminary objection against the sustenance of the appeal was upheld. Viscount Cave, in delivering the judgment of the Board, observed as follows :

"The question as to what is a final order was considered by the Court of Appeal in the cases of *Salaman* v. *Warner*[1], *Bozson* v. *The Altrincham Urban District Council*[2] and *Issacs* v. *Salbestien*[4]. The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way."

These observations show that the Judicial Committee considered that the words used in the abovementioned three English decisions gave the same meaning to the expression "final order", and adopted the definition as given by Lord Esher, M.R., in *Salaman's case*[1]. The Judicial Committee further held that when the effect of the order was to leave the rights to be determined by the Court in the ordinary way, the order was not a final order.

In *Abdul Rahman* v. *D. K. Cassim & Sons*[5], Sir George Lowndes, in delivering the judgment of the Judicial Committee, stated that the test of finality was whether the order finally disposed of the rights of the parties. Referring to *Ramchand Manjimal's case*[3], he observed as follows :

"Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order 'finally disposes of the rights of the parties,' and he held that the order then under appeal did not finally dispose of those rights, but left them 'to be determined by the Courts in the ordinary way.' It should be noted that the Appellate Court in India was of opinion that the order it had made 'went to the root of the suit, namely, the jurisdiction of the Court to entertain it,' and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109-A of the Code."

Sir George Lowndes further added :

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1. (1891) 1 Q.B. 734.
2. (1903) 1 K.B. 547.
3. (1920) 39 M.L.J. 27 : L.R. 47 I.A. 124 : I.L.R. 47 Cal. 918 (P.C.).
4. (1916) 2 K.B. 139.
5. (1932) 64 M.L.J. 307 : L.R. 60 I.A. 76 : I.L.R. 11 Rang. 58 (P.C.).

"In their Lordships' opinion it is impossible to distinguish the present case from that upon which Lord Cave pronounced. The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way."

In *Hori Ram Singh* v. *The Crown*[1], it was contended that section 205 was limited to appeals in civil cases only. The Court rejected that contention. Sulaiman, J., after rejecting the contention, further considered the meaning of the words "judgment, decree and final order" in section 205 (1) of the Constitution Act. The words "final order" were used in section 109 of the Civil Procedure Code. That section prescribes conditions under which an appeal lies to the Judicial Committee of the Privy Council from a decree or final order passed on appeal by a High Court. It was noticed that the words "final order" were used in contrast with interlocutory order. The learned Judge took the view that in cases in which the decision of the point in dispute either way did not result in finally disposing of the matter before the Court, the decision did not amount to a final order. In that case, as noted in the judgment of Varadachariar, J., no objection was taken on behalf of the Crown to the maintainability of the appeal and the majority of the Judges therefore dealt with the case on the assumption that an appeal was competent.

In *Venugopala Reddiar and another* v. *Krishnaswami Reddiar and another*[2], a suit was filed in Trichinopoly (South India) for recovery of properties some of which were situate in Burma and some in South India. On the 1st April, 1937, Burma ceased to be a part of British India. The suit, when instituted, was permissible under section 17 of the Civil Procedure Code. After the separation of Burma, it was contended by the defendant that the Court ceased to have jurisdiction in respect of lands which were situate in Burma. The contention was negatived. On appeal to the Federal Court, the decision of the lower Court was confirmed but the Federal Court reserved its opinion on the question whether the order of the High Court holding that the lower Court had jurisdiction to try the suit and directing it to proceed with the trial, was a judgment so as to be appealable under section 205 (1) of the Constitution Act. Again, in that case, as no objection as to the maintainability of the appeal was taken, the Court decided the appeal on merits.

In the present case, a preliminary objection has been taken and we have therefore to decide the point urged before us. The Government of India Act, 1935, being a statute of the Imperial Parliament, the words "judgment, decree or order" used therein would have the meaning given to them in the Interpretation Act, 1889[3], if they were defined there. That Act, however, contains no definition of any of those words. The inclusive definitions of judgment and decree in the Supreme Court of Judicature Act of 1873 is not helpful, as those definitions are for the purposes of that Act alone. We have therefore to ascertain the meaning of those words otherwise. We have noticed above the meaning given to the expression "final order" by the English and Indian Courts. Those decisions were in civil cases. We think that the same meaning should be given to that expression in criminal cases also, that is to say, it must be an order which finally determines the points in dispute and brings the case to an end.

It is next necessary to ascertain the meaning of the words "judgment and decree". In England in civil actions a decree is understood to be the same as a judgment. If so, as there may be a preliminary decree, there may be a preliminary judgment. In *Maori King (Cargo Owners)* v. *Allen*[4], Lord Esher, M.R., stated that an order declaring rights is equivalent to a judgment. It may be either a final or a preliminary and therefore interlocutory judgment. In *Onslow* v. *Inland Revenue Commissioners*[5], Lord Esher, M.R., stated that a judgment is a considered decision in an action of a previously existing liability and every other decision

1. (1939) 2 M.L.J. (Supp.) 23: (1939) F.C.R. 159 : 2 Fed.L.J. 153 (F.C.).
2. (1943) 2 M.L.J. 57 : (1943) 6 F.L.J. 47 : 1943 F.C.R. 39 (F.C.).
3. 52-53 Victoria, Ch. 63.
4. (1895) 1 Com. Cas. 104 (C.A.).
5. (1890) 25 Q.B.D. 465.

of a Court is an order. These and other English decisions make it clear that in England when the word judgment or decree is used, whether it is preliminary or final, it means the declaration or final determination of the rights of the parties in the matter brought before the Court. In criminal proceedings, an examination of the discussion in paras. 260-64 of Vol. IX of Halsbury's Laws of England (Hailsham Edition) shows that the word "judgment" is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused. The word "decree" is of course out of place in a criminal proceeding.

In India, for civil suits, the words judgment and decree are defined in section 2 of the Civil Procudure Code, 1908. A judgment means the statement given by the judge of the grounds of a decree or order passed by the Court. A decree is defined

> "as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

As a judgment is only the grounds for an order, it is not the order, and this distinction is maintained by omitting the word judgment from section 109 of the Civil Procedure Code, which deals with the right of appeal to the Judicial Committee from the High Court. In that section a right of appeal is given against the decree or final order only. The definitions given in the Code are, however, for the purposes of the Code only. In our opinion, the decisions of the Courts in India show that the word "judgment", as in England, means the determination of the rights of the parties in the matter brought before the Court.

In India, in the Criminal Procedure Code, the word "judgment" is used to indicate the termination of the case by an order of conviction or acquittal of the accused. The word is not defined in the Criminal Procedure Code but that interpretation was put on the word in a criminal proceeding in *Emperor* v. *Maheswara Kondaya*[1]. That view appears to have been approved by Sulaiman, J., in *Hori Ram Singh's case*[2].

Our attention was called to clause 39 of the Letters Patent of the High Courts of Calcutta, Bombay and Madras which provides for appeals to His Majesty-in-Council from "any final judgment, decree or order" and it was urged that in the absence of the qualifying word "judgment" in section 205 (1) of the Constitution Act must be held to include a preliminary or interlocutory judgment and that the order now under appeal fell under that category. We are unable to accede to this view. In our opinion, the term "judgment" itself indicates a judicial decision given on the merits of the dispute brought before the Court. In a criminal case it cannot cover a preliminary or interlocutory order.

On behalf of the appellant it was contended that the observation of Sir Maurice Gwyer in *Hori Ram Singh's case*[2] that the words judgment, decree or final order ought to receive no narrow interpretation is against the contentions of the respondents. It was urged that in *King-Emperor* v. *Shibnath Banerji*[3], the Judicial Committee of the Privy Council had approved of that observation. It was argued that this approval amounted to a disapproval of the view of Sulaiman, J., expressed in his judgment in *Hori Ram Singh's case*[2]. In our opinion this whole argument is based on reading the observations in the judgments detached from their context. What Sir Maurice Gwyer, C.J., stated in *Hori Ram Singh's case*[2] was only to emphasise that the words "any judgment, decree or final order of a High Court" covered a criminal case and also a civil case. The learned Chief Justice was not considering whether the order in question before the Bench was a final order or not and whether on that ground the appeal was competent or not. This point is made clear in the judgment of Varadachariar, J., which Sir Maurice Gwyer, C.J., had adopted in his judgment. The observations in *King Emperor* v. *Shibnath Banerji's case*[3] were also intended to

1. (1908) I.L.R. 31 Mad. 543 at 545.
2. (1939) 2 M.L.J. Supp. 23: (1939) F.C.R. 159 : 2 F.L.J. 153 (F.C.).
3. (1945) 2 M.L.J. 325 : L.R. 72 I.A. 241 : 1945 F.L.J. 222 : (1945) F.C.R. 195 at 210 (P.C.).

uphold the position that section 205 (1) of the Constitution Act gave the Federal Court appellate jurisdiction both in civil and criminal matters and that the jurisdiction was not limited to civil matters only. It was also in that connection that their Lordships emphasized the width of the language used in the section. We are unable to read those observations as disapproving in any manner the view of Sulaiman, J., in *Hori Ram Singh's case*[1] about the true meaning of the words judgment or final order in section 205 (1) of the Constitution Act.

It was argued on behalf of the appellant that the words judgment or final order should be given a wider interpretation so as to enable the Court to entertain appeals like the present in criminal matters in any event. We are unable to accept this contention. The words are used in section 205 (1) of the Constitution Act and impart jurisdiction to the Federal Court to entertain appeals both in civil and criminal matters. As the same words give jurisdiction to the Court in both classes of cases, it will be improper to construe them in a certain way when applicable to appeals in civil matters and give them a wider meaning when considered in connection with appeals from criminal proceedings. The words judgment and final order, in connection with civil appeals, have received a definite judicial interpretation. In connection with civil appeals to this Court therefore that interpretation has to be accepted. If so, the same interpretation has to be accepted in case of appeals from criminal proceedings brought to this Court under section 205 (1) of the Constitution Act. In our opinion this argument of the appellant is against all well-recognised canons of construction.

It was argued on behalf of the appellant that the words "of a High Court" in section 205 (1) have a material bearing on the point. It was contended that the order made on the revision application is the final order of the High Court and therefore the appeal is competent. In our opinion, that is not a correct reading of section 205 (1) of the Constitution Act. The words "of a High Court" are used to indicate that the appeal can be brought only from the judgment, decree or final order of a High Court as contrasted with the judgment, decree or final order of a District or any other Court. To put it in other words, the word "final" controls the word "order" and it is an order of that nature against which an appeal could be brought to the Federal Court.

The question then is whether in the present criminal case the order is a "judgment, decree or final order of the High Court"? It is clearly not a decree. It is also not a judgment, as it is only an interlocutory order made on a preliminary objection in the course of a criminal trial. It is also not a final order, as the order is not on a point which, decided either way, would terminate the matter before the Court finally. In the words of Sir George Lowndes, to constitute a final order it is not sufficient merely to decide an important or even a vital issue in the case, but the decision must not keep the matter alive and provide for its trial in the ordinary way. It is therefore clear that the order made on the Criminal Revision application by the Madras High Court is not a final order or judgment within the meaning of section 205 (1) of the Constitution Act. Indeed, if "judgment" were to mean or include an interlocutory order, the words "final order" in section 205 (1) of the Government of India Act, 1935, will be superfluous. The preliminary objection is therefore upheld and the appeal is dismissed.

Appeal dismissed.

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1. (1939) 2 M.L.J. (Supp.) 23 (F.C.) : (1939) F.C.R. 159 : 2 Fed. L.J. 153.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

N. Appavu Udayan and another .. *Appellants**

v.

Nallammal .. *Respondent.*

Hindu Law—Maintenance—Daughter-in-law—Obligation of father-in-law to maintain widow of a divided son—Nature and extent of—Liability of divided sons taking the father's self-acquired property by inheritance to maintain their brother's widow—Existence of indigence—Necessity to establish liability.

A widowed daughter-in-law has a moral, but not a legal right to maintenance from her father-in-law out of his self-acquired property. On the death of the father-in-law, if his self-acquired property descends by inheritance to his heirs, the moral liability of the father-in-law ripens into a legal liability of his heirs enforceable against them by the daughter-in-law to the extent of their inheritance.

The father-in-law's moral obligation to maintain his widowed daughter-in-law arises out of the affinity between them: it is not dependent upon and is irrespective of the family status which existed between the father and the son. Moreover, since the liability relates solely to the father-in-law's self-acquisitions, there is no reason for its application to be dependent upon the existence or non-existence of a joint status. Hence the fact of a partition in the father-in-law's family before the death of the son cannot affect either the moral liability of the father-in-law or the legal liability of his other sons to whom on his death his self-acquired property has descended by inheritance.

Case-law discussed.

In either case, existence of indigence is not an essential factor to be proved to establish liability.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Kuppuswami Aiyar, J., dated 21st January, 1947 and passed in S.A. No. 102 of 1946 preferred to the High Court against the decree of the Court of the Subordinate Judge, Trichinopoly, in A.S. No. 56 of 1945 (O.S. No. 379 of 1944, District Munsiff Court, Kulitalai).

T. V. Ramanatha Aiyar for Appellants.

A. Srirangachari for Respondent.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—The material facts in this Letters Patent Appeal can be stated shortly. The plaintiff's husband and the two defendants were brothers and together with their father, they formed a joint Hindu family governed by the Mitakshara school of Hindu law. By a deed of partition, dated 31st December, 1924, the family was disrupted and each member was allotted and took a one-fourth share of the family property; after the partition each lived separately from the others. The plaintiff's husband died in 1929; the plaintiff sold the property which devolved upon her from her husband and utilised the proceeds to discharge his debts, the surplus remaining was a sum of about Rs. 85, or its equivalent. She was in indigent circumstances, her father-in-law took her into his house and maintained her out of his self-acquired property, until he died in 1943. Upon his death, the two defendants, as the heirs of their father, inherited his self-acquisitions.

In the suit, out of which this appeal arises, the plaintiff claimed maintenance from the defendants, on the ground that, during his life-time her father-in-law was under a moral obligation to support her, on his death that obligation ripened into a legal liability of the sons, as their father's heirs, to maintain her to the extent of the property which they had inherited from their father. The learned District Munsiff of Kulitalai decreed the suit in the plaintiff's favour and fixed the amount of maintenance; the learned Subordinate Judge of Trichinopoly allowed the defendants' appeal and dismissed the suit. In second appeal by the plaintiff to this Court, Kuppuswami Aiyar, J., restored the decree of the learned District Munsiff. This appeal is preferred by the defendants against the decision of Kuppuswami Aiyar, J.

*L.P.A. No. 27 of 1947. 12th December, 1947.

There are two principles of Hindu law, each of which is well established by authority which indubitably apply to members of a joint Hindu family : they are :

(1) A widowed daughter-in-law has a moral, but not a legal, right to maintenance from her father-in-law out of his self-acquired property.

(2) On the death of the father-in-law, if his self-acquired property descends by inheritance to his heirs, the moral liability of the father-in-law ripens into a legal liability of his heirs, enforceable against them by the daughter-in-law to the extent of their inheritance. Those principles of law are expressed in a number of decisions of several Courts in India including : *Janki* v. *Nandram*[1], accepted by a Full Bench of this Court in *Ambu Bai* v. *Soni Bai*[2], *Provosh Chandra Roy* v. *Prokash Chandra Roy*[3], and *Mussamat Laxmi Bai* v. *Samba*[4]. Those decisions relate to Mitakshara families. The correctness of the principles of law has been affirmed by the Judicial Committee in *Rajnikanta Pal* v. *Sajanisundaree Dasee*[5], where it was observed, at pages 224 and 225 of the judgment, that :

> "The liability of Madanmohan towards the widow of his son was, no doubt, on the authorities, a moral liability, but that liability when transmitted to his sons on his death, became, in their persons, a legal liability, the measure of which, however, was restricted to the amount of the estate to which they succeeded from their father. These principles of law have been established by authoritative judgments and are applicable to a family governed, as was this family, by the Dayabhaga law. The matter is not one which can be reopened before their Lordships."

In all the decisions cited, the two obligations, moral and legal, are not expressed to be confined to the instance when a widowed daughter-in-law is penniless but the obligations have general application regarding the moral liability of the father-in-law and the legal liability of his heirs to maintain a widowed daughter-in-law. In argument, reference was made to the penniless state of the daughter-in-law and, it was contended, that indigence must exist and is an essential factor before liability can be established. There is no warrant for such contention in the authoritative decisions.

The sole question in this appeal is whether the moral obligation of a father-in-law to maintain his widowed daughter-in-law and, upon his death, the ripening of that obligation into a legal liability of his heirs, arises when there has been a disruption by partition in the family of which the father-in-law and the deceased husband of the widowed daughter-in-law were members or whether those two obligations are confined to members of a Hindu undivided family.

Learned counsel for the defendant-appellants argued that a daughter-in-law cannot have a greater right than that possessed by her husband during his lifetime ; in that connection, he pointed out that, during the lifetime of the plaintiff's husband there was no moral obligation upon the father to maintain his son ; consequently, it was contended, that in the present instance, there was no moral liability of the father to maintain his widowed daughter-in-law. Undoubtedly, and it was not argued to the contrary, that, in the case of a joint family possessed of no family property but, where the father has his own self-acquired property, and adult son, who is not permanently disabled from supporting himself, has no moral or legal right to be maintained by his father out of his self-acquisitions ; nevertheless, upon the son's death the father has a moral liability to maintain the son's widow. In the case of an undivided family, unquestionably, a son's widow has a greater right (the father-in-law's moral obligation to her being considered as the daughter-in-law's right) than that possessed by her husband during his lifetime. No authority was cited in support of the contention.

Mr. Ramanatha Aiyar, for the defendants, referred to a decision of a Bench of the Bombay High Court in *Yamunabai* v. *Manubai*[6], where the legal obligation

1. (1888) I.L.R. 11 All. 194 (F.B.).
2. (1940) 2 M.L.J. 298 : I.L.R. 1941 Mad. 13 (F.B.).
3. (1946) 50 C.W.N. 559.
4. A.I.R. 1932 Nag. 11.
5. (1933) 66 M.L.J. 148 : L.R. 61 I.A. 29 : I.L.R. 61 Cal. 221 (P.C.).
6. (1899) I.L.R. 23 Bom. 608.

of the heirs of a deceased father-in-law was enforced in favour of a widowed daughter-in-law when the father and his son were members of a joint Hindu family; reliance was placed upon an observation, at page 613 of the report, that the distinction of union or separation was very material. That observation was made after reference to another decision by the Bombay High Court in *Savitri Bai* v. *Luxmibai*[1], where the relevant facts were the following: the plaintiff was the widowed daughter-in-law of one Balcrustna deceased, the defendant being his brother Sadasiv; more than 20 years before the suit, a partition took place in the family of which Balcrustna and Sadasiv were members, whereby the family property was sold and the proportion of the proceeds, due to Balcrustna's and Sadasiv's branch were divided in cash equally between them; the plaintiff sued Sadasiv for maintenance. At page 581 of the report it was observed that: none of Balcrustna's share was forthcoming and he had probably expended the whole of it before his death; Sadasiv's share had also been expended and he appeared to be dependent on his salary as a clerk; Sadasiv had no paternal estate in his hands and did not inherit any property from the plaintiff's husband. It would appear, also, that Sadasiv inherited no estate from Balcrustna. In those circumstances, whilst Sadasiv was the heir of Balcrustna, since he inherited no property from him and possessed no estate of Balcrustna, there was nothing against which a legal liability could be enforced by the widowed daughter-in-law. The suit was dismissed, the reason given being that Sadasiv was separated in estate from the plaintiff's husband and, from the husband's father at the time of their deaths. In those two decisions, by the Bombay High Court, there was no discussion upon the question of the moral liability of a father-in-law to maintain his widowed daughter-in-law out of his self-acquired property nor of the legal liability of his heirs in that respect.

In *Ambu Bai's case*[2], it was held that a father is under a moral obligation to support his widowed daughter when she is in want and when her late husband's family cannot maintain her, further, applying the principle, as explained in *Janki's case*[3], of the ripening of a moral liability of a father-in-law into a legal liability of his heirs to maintain a widowed daughter-in-law, it was also held that a father's heir, (the widow and the daughter's step-mother in *Ambu Bai's case*[2]), was under a legal obligation to maintain the father's indigent daughter out of the inheritance from the father. In the present instance, it is conceded that, if there was a moral obligation of the plaintiff's father-in-law to maintain her, there is a legal obligation of the defendants, as his heirs, to continue the maintenance to the extent of their inheritance of his self-acquired property.

Whilst the several decisions, recognising the father-in-law's moral obligation and his heirs' legal obligation to maintain a widowed daughter-in-law, were given where there had been no disruption in a Hindu joint family, nevertheless, in none of those decisions, except in the two Bombay cases, is any distinction sought to be drawn between a widow of a husband who was a member of an undivided family and a widow of a separated husband; the undivided status of the husband's family is not given as the reason for the existence of the moral obligation of the father-in-law; but the principle of that liability is enunciated in terms of general application. Whether the family is joint or whether it is divided in status, the members of it have no right with respect to the father's self-acquired property during his life-time and, again, whether united or separated, the father's self-acquisitions descend to his heirs (his sons, if there be any) upon his death intestate. No question of right by survivorship, even with respect to undivided sons, arises regarding those self-acquisitions. The observations by their Lordships of the Judicial Committee in *Rajnikanta Pal's case*[4], expressing the father-in-law's undoubted moral

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1. (1878) I.L.R. 2 Bom. 573 (F.B.).
2. (1940) 2 M.L.J. 298: I.L.R. 1941 Mad. 13 (F.B.).
3. (1888) I.L.R. 11 All. 194.
4. (1933) 66 M.L.J. 148: I.L.R. 61 Cal. 221: L.R. 61 I.A. 29 (P.C.).

liability, make no reference to the status of his family or of that of his deceased son nor is it stated that that liability is restricted to a daughter-in-law whose late husband was joint in status with his father. Apparently, the liability is recognised because of the relationship between the father-in-law and his daughter-in-law. The property, it would seem, inherited by the heirs of the father-in-law is solely material upon the question as to the amount of maintenance which the daughter-in-law has a legal right to receive from the heirs since, it is stated by their Lordships, the measure of that liability is restricted to the amount of the estate to which the sons (as there expressed) succeeded from their father. Further, the Board held that the father-in-law's moral liability, when transmitted to his sons (heirs) on his death, became, in their persons, a legal liability. Clearly, so far as the heirs are concerned, their liability arises out of their personal position as heirs, as such, and not by virtue of a membership of a joint Hindu family. The principle that an heir takes the inheritance burdened with a legal liability to fulfil the moral liability of the late proprietor, is based upon the theory that he takes, not for his own benefit, but for the spiritual benefit of the late proprietor and, in so taking it, those things must be done by the heir which the deceased would have done if he had lived. That principle and that theory are unconnected with the family status of the late holder or of his heir.

The moral burden of a father-in-law relates to his own self-acquisitions, with which he can deal as he likes, whether his family be joint or divided. He can dispose of that property by gifts or by will, unfettered by the status of the family, whatever it be, and, if he dies intestate, it descends to his heirs ; even when the family is joint and the proprietor is survived by sons, upon intestacy that property devolves upon the sons by inheritance and not by surivorship. In *Rajnikanta Pal's case*[1] and in the decisions of the Indian Courts which are in accord with it, the approach to the question of the moral liability is made by way of the relationship between the father-in-law and his daughter-in-law ; consideration is not given to any other aspect. Since the liability relates solely to the father-in-law's self-acquisitions, there is no reason for its application to be dependent upon the existence or non-existence of a joint status. The principle of the father-in-law's moral liability as held in *Rajnikanta Pal's case*[1] is applicable to a family governed by the Dayabhaga school of law and is not confined to members of a Mitakshara family. According to the former law, the foundation of a co-parcenary is first laid on the death of the father ; while he is alive there is no co-parcenary, in the strict sense, between him and his sons ; the sons do not acquire any interest in ancestral property at birth, but, until his death, the father is the sole and absolute owner of it and can manage it in any manner he likes ; upon his death, his sons inherit both the ancestral property and the father's self-acquisitions as his heirs. In those circumstances, in a Dayabhaga family, the father's moral obligation to his widowed daughter-in-law cannot in any way be dependent upon or influenced by the question as to the united or divided status of his family. Their Lordships of the Judicial Committee do not suggest that the principle of liability is different in the two schools of Hindu law. In my view the father-in-law's moral obligation to maintain his widowed daughter-in-law arises out of the affinity between them ; it is not dependent upon and is irrespective of the family status which existed between the father and the son. If the decisions in *Yamunabai's case*[2] and *Savitribai's case*[3] are at variance with the opinion which I have ventured to express, then, with respect, I am unable to agree with them.

The plaintiff is the widow of a son of the defendants' late father. If there had been no partition between the members of her husband's family, it is unquestioned that her father-in-law would have been under a moral liability to maintain her out of his self-acquired property and, upon his death and the inheritance by the defendants of the property, that that moral liability would have ripened into

1. (1933) 66 M.L.J. 148 : L.R. 61 I.A. 29 : I.L.R. 61 Cal. 221 (P.C.).
2. (1899) I.L.R. 23 Bom. 608.
3. (1878) I.L.R. 2 Bom. 573 (F.B.).

a legal liability enforceable by the plaintiff against them to the extent of the property which they inherited from their father. In my opinion, the incident of partition between the members of the family of the father-in-law and of the defendants affects neither the father-in-law's moral liability nor the defendants' legal liability to support the plaintiff. The father-in-law had a moral liability for maintenance which arose solely out of his relationship to the plaintiff. The moral liability being established, as abovementioned, it is conceded it ripened on his death into a legal liability of the defendants.

It is to be observed that the father-in-law accepted responsibility for the plaintiff's maintenance, from the time of the death of her husband in 1929, throughout the remainder of his life, until he died in 1943. In that connection it is instructive to refer to a decision by a Bench of this Court in *Ammakannu* v. *Appu*[1], where, at page 93, it is observed that:

> "If the former" (father-in-law) "who acquired the property and who was competent to alienate it at his pleasure, subjected it to her" (daughter-in-law) "maintenance, either by express declaration or by conduct, the heir could only take it subject to the appointment made by the person who acquired the property."

In the present instance the plaintiff's father-in-law, by his conduct in supporting the plaintiff out of his self-acquisitions from the commencement of her widowhood until his death, manifested that he subjected that property to her maintenance.

It was not contended that the amount of the plaintiff's maintenance as fixed by the learned District Munsiff, is either incorrect or is unjustified by the amount of the defendants' inheritance from their father.

In *Vadrevu Sankaramurthi* v. *Vadrevu Subbamma*[2] whilst the moral obligation of a father-in-law and the legal obligation of his heirs to maintain a widowed daughter-in-law were not questioned, it was held that a daughter-in-law had no legal right to maintenance against the devisee or donee of a father-in-law's self-acquired property when it descends by deed or will or gift and not by inheritance. The circumstances in that case do not arise in the present instance and discussion of that decision is unnecessary.

In my opinion, for the reasons given, the decision of Kuppuswami Aiyar, J., restoring the decree of the learned District Munsiff, was correct and this appeal should be dismissed with costs.

Rajamannar, J.—I have had the opportunity to peruse the judgment delivered by my Lord the Chief Justice. I agree with it entirely and wish to add a few words only.

The only question which falls to be considered in this case is whether a Hindu father is under a moral obligation to maintain the widow of a deceased divided son out of his separate or self-acquired property; for it is not disputed, and it is well established, that if the father is under a moral obligation, then, on his death, his heirs who take his property would be under a legal obligation to maintain her.

It is conceded that in an undivided Hindu family governed by the Mitakshara law though there be no joint or ancestral property, when the father is possessed of separate and self-acquired property and his son dies, undivided from him the father is under a moral, though not legal, obligation to maintain the widow of the deceased son. But it was contended by the appellants that there is no such moral obligation if the son had been separated from the father before his death.

It is no doubt true that practically every decision on the point deals with a case in which the son had died undivided from the father. It must, at the same time, be observed that in none of the decisions has it been laid down that it is an essential condition that the son should have died undivided, except in the two cases of the Bombay High Court in *Savitribai* v. *Luxmibai and Sadasiv Ganoba*[3] and *Yamunabai* v. *Manubai*[4].

1. (1887) I.L.R. 11 Mad. 91.
2. (1939) 1 M.L.J. 301.
3. (1878) I.L.R. 2 Bom. 573 (F.B.)
4. (1899) I.L.R. 23 Bom. 608.

In my opinion there is abundant authority in the ancient Hindu law texts on which the moral obligation of the father-in-law to maintain a widowed daughter-in-law can be founded. Manu says :

"The support of the group of persons who should be maintained (भरणं पोष्यवर्गस्य) is the approved means of attaining heaven, but hell is the man's portion if they suffer ; therefore he should carefully maintain them."(Cited in Dayabhaga, ii, 23)."

He goes on to describe the group of persons so to be maintained :

"The father, the mother, the Guru, a wife, an offspring, poor dependents (दीनाः समाश्रिताः), a guest and a religious mendicant are declared to be the group of persons who are to be maintained." (Cited in Sri Krishna's Commentary on the Dayabhaga).

It is admitted that a widowed daughter-in-law in an undivided family would be a dependent of the father-in-law but it is urged that if the son had become separated from the father, she would no longer be such a dependent. This, in my opinion, is taking too narrow a view of the injunction of Manu and too unrealistic a view of the effect of partition. The following remarks of West and Buhler in their digest of Hindu Law (third edition) are apposite in this connection. In discussing the question whether the right to maintenance can be asserted by a widow of a separated member, the learned authors say as follows :

"As to the first of these questions it is to be observed that a partition does not effect such a total severance amongst the members of a Hindu family that they stand thenceforth in the relation of mere strangers to each other. They may reunite again : they have mutual rights of succession in which fuller blood relationship between severed brethren counterbalances the effect of reunion between those of the half blood ; the obstacles to marriage still subsist between their families ; in obsequies, mourning and the ceremonial impurity arising from death, they are still relatives as they were before the partition." (Page 231).

The learned authors refer to a passage from Narada that :

"When the husband is dead his kin are the guardians of his childless widow ; in disposing of her, in protecting and maintaining her, they have full power." (XIII, 27, 28).

Dr. Jolly cites from Kamalakara, who in his Vivadatandava says that :

"It is incumbent on the sons and grandsons to maintain indigent widows and daughters-in-law, though no wealth of the father may be in existence."

According to him :

"In reality the claim of the female family members to maintenance does not become extinct either through the absence of assets, or *in the somewhat analogous case of a separation of the co-parceners having taken place.*"

At page 136, the learned author says :

"Where the co-parceners choose to remain united, all their female relations may claim a maintenance, nothing more. The same rule, according to some writers, obtains *even where they separate.*"

It is I think sufficient to refer to Sarasvati Vilasa, a work considered as authoritative in South India where it is laid down that the father-in-law should allot an annual maintenance or a share in land to the daughter-in-law according to his pleasure (verse 522). Verse 531 expressly indicates that there is no distinction in principle between the wives of divided and undivided men ; for it says :

"Thus it should be understood that all the texts which enjoin the giving of maintenance to women apply to the case of wives of undivided men and women of divided men."

No doubt as pointed out by Banerjee, J., in *Kaminee Dassee* v. *Chandra Pode Mondle and Co.*,[1] and by Das, J., in *Provash Chandra Roy* v. *Prokash Chandra Roy*[2], it may be a question of fact in some cases whether the particular person concerned is or is not a dependent of the family to maintain whom the father of the family is under a moral obligation. Leach, C.J., points out in *Ambu Bai* v. *Soni Bai*[3], page 19 :

"The texts carry the moral obligation far beyond the limit which could be accepted in modern times."

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1. (1889) I.L.R. 17 Cal. 373.
2. (1946) 50 C.W.N. 559.
3. (1940) 2 M.L.J. 298 : I.L.R. 1941 Mad. 13 at page 19 (F.B.).

But it has been uniformly held that a widowed daughter-in-law is one of the dependent persons in respect of whom the father is under such moral obligation. And none of the texts cited in *Savitribai* v. *Luxmibai and Sadasiv Ganoba*[1] and *Yamuna Bai* v. *Manu Bai*[2] negatives such a *moral* obligation in a case in which the son died divided from the father. I agree with my Lord the Chief Justice that this appeal should be dismissed.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Bijjili Papamma and another .. *Petitioners.**

Indian Penal Code (XLV of 1860), section 193 and Criminal Procedure Code (V of 1898), section 476—Capital charge—Witnesses making contradictory statements—Explanation that they were threatened by the police at one stage and prisoners at another—No evidence of such threat—Should be proceeded against for perjury.

In a capital case where irreconcilable or totally contradictory statements are made by witnesses and the only explanation offered is that at one stage they were threatened by the prisoners and at another stage by the police and there is no evidence of such threats, the witnesses in such a case should be proceeded against under section 193, Indian Penal Code, read with section 476, Criminal Procedure Code and complaint should be made in order to determine whether they are liable to be convicted of the offence of perjury.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the District Magistrate of Anantapur dated 28th day of February, 1947, and made in C. A. No. 3 of 1947 preferred against the order of the Court of the Stationary Sub-Magistrate of Anantapur in M. C. Nos. 3 and 2 of 1946.

C. Kondiah for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—I entirely agree with the view that the District Magistrate has taken in this case. The only circumstance pressed for consideration is that, admittedly, the petitioners stated at the earliest stage to the Circle Inspector that they knew nothing about the offence. But, it is said, that that was because of the threats held out by the accused in this case. Subsequently when statements under section 164, Criminal Procedure Code, were recorded the witnesses spoke to have witnessed the occurrence and gave details. It is alleged that that was on account of pressure of ill-treatment by the police. The District Magistrate has pointed out in his judgment that there is no evidence to show that they were in fact beaten or threatened. Apart from that circumstance the statements made under section 164, Criminal Procedure Code and before the committing Magistrate are irreconcilable. It is obvious therefore that the petitioners should have made one of those statements knowing that it was not true. The first factor, namely, whether an offence appears to have been committed by the petitioners is *prima facie* established. The second factor is about the expediency in the interests of justice. In a capital case where irreconcilable or totally contradictory statements are made by witnesses of the crime at different stages of time and the only explanation offered is that at one stage they were threatened by the prisoners and at another stage by the police, the witnesses in such a case should be proceeded against under section 193, Indian Penal Code, read with section 476, Criminal Procedure Code and a complaint should be made in order to determine whether they are liable to be convicted of the offence of perjury. In this connection section 236, Criminal Procedure Code, and Illustration (*b*) thereof are much in point. Both the criminal revision petitions are dismissed.

V.P.S. ——— *Petitions dismissed.*

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1. (1878) I.L.R. 2 Bom. 573 (F.B.).
2. (1899) I.L.R. 23 Bom. 608.

* Crl. R. C. Nos. 580 and 581 of 1947. (Crl. R. P. No. 476 and 477 of 1947). 7th November, 1947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

The Public Prosecutor .. *Appellant**

v.

Y. Ramachandrayya and another .. *Respondents.*

Madras Prevention of Adulteration Act (III of 1918), *section* 5 (1) (b) *and rule* 27 *of the Rules framed under the Act—Salesman of registered co-operative society delivering to member for a price milk containing* 12 *per cent. water—Nature of the transaction—Salesman if guilty of an offence under section* 5 (1) (b)*—Madras Co-operative Societies Act* (*VI of* 1932), *section* 20*—Scope and effect of.*

Section 20 of the Madras Co-operative Societies Act is very general and imparts a corporate character to the society registered under the Act. Such a society can own property and transact business quite irrespective of its members. As a body corporate it has got a separate existence apart from its individual members and as such when an article belonging to it is transferred to one of its individual members for a consideration the transaction amounts to a sale under section 4 of the Sale of Goods Act. It cannot be said that in the case of such societies there can be no transactions of sale of the articles but only a distribution of them amongst its members.

Hence, where a salesman of a registered co-operative society delivers to a member for a price milk containing 12 per cent. water, the transaction is a sale and he would be guilty of an offence under section 5 (1) (*b*) of the Madras Prevention of Adulteration Act for having contravened the provisions of rule 27 of the Rules framed under section 20 (2) (*f*) of the same Act.

Appeal under section 417 Criminal Procedure Code 1898, against the acquittal of the aforesaid respondents (accused) by the Stationary Sub-Magistrate, Bapatla, in C.C. No. 62 of 1947 on his file.

The appellant in person.

Y. G. Krishnamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The Public Prosecutor, Madras, appeals against the acquittal of the two respondents of an offence under section 5 (1) (*b*) of the Madras Prevention of Adulteration Act for having contravened the provisions of rule 27 of the Rules framed under section 20 (2) (*f*) of the same Act. The first respondent is the Secretary of the Co-operative Milk Society, Bapatla, and the second respondent, a salesman in that society. The learned Public Prosecutor did not press the case as regards the first respondent and his acquittal has therefore to be confirmed. As regards the second respondent, the case is that on the 19th October, 1946, he sold milk containing 12 per cent. of water to P.W. 1, the sanitary inspector and passed a receipt Ex. P-2. What happened was that when the second respondent was delivering a quantity of milk to one Mr. Venkatasubbayya, the proprietor of Maruthi Vilas Coffee Hotel, Bapatla, P.W. 1., came there, took out a quantity and paid the cost of it to the second respondent. This milk, when analysed by the Government Analyst, was found to contain 12 per cent. of water and on the strength of the Analyst's certificate, both the respondents were prosecuted. The Stationary Sub-Magistrate of Bapatla held that there was no sale of milk as contemplated by the Madras Prevention of Adulteration Act and therefore acquitted both the respondents.

The reason on which the lower Court found the respondents not guilty was that the milk society was a composite body consisting of a number of members of which the proprietor of the Maruthi Vilas Coffee Hotel was one and when the society was delivering milk to one of its members, it was not a sale as contemplated by the Act but the transaction was one by which an undivided joint owner of the entire assets of the society was being given his share of the milk and as such, in law, it could only be a distribution of the article among the members which would not amount to a sale. For this contention the learned Sub-Magistrate relied upon a decision of this Court in the *Public Prosecutor* v. *Srinivasarao*[1].

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* Crl. Appeal No. 352 of 1947. 9th December, 1947.

1. (1938) M.W.N. 317.

The lower Court has not correctly appreciated the above decision. Lakshmana Rao, J., did not in fact lay down that in the case of a society registered under the Madras Co-operative Societies Act, there cannot be, in law, a sale at all but only a distribution of the articles among the members. The learned Judge definitely states that it is unnecessary to consider that question as on the facts themselves, the order of acquittal was right. The learned Judge was only stating in so many words the reason on which the lower appellate Court in that case rested its decision of acquittal. It cannot be said that the decision aforesaid is authority for the position that in all co-operative societies registered under the Madras Co-operative Societies Act, there can be no transaction of sale of an article, but only a distribution of the articles amongst the various members.

Section 20 of the Madras Co-operative Societies Act (VI of 1932), enacts that the registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purpose for which it was constituted. This makes it clear that as a body corporate it has got a separate existence apart from its individual members and when an article belonging to this body corporate is transferred to one of its individual members for a consideration, it cannot be said that it does not amount to a sale under section 4 of the Sale of Goods Act.

Mr. Y. G. Krishnamurthi appearing for the second respondent relies upon the decisions in *Graff* v. *Evans*[1] and *Humphrey* v. *Tudgay*[2], for his argument that in circumstances like the present there is no sale at all. In the first of these cases it was held by the English Courts that the distribution of liquor for price to a member of a club by the manager cannot be considered to be a sale within the meaning of section 3 of the Licensing Act of 1872, which enacted that no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same. I am unable to see the analogy between the supply of liquor by the management of a club to its members and the sale of certain articles by a co-operative society registered under the Madras Co-operative Societies Act to one of its members. The reports do not show what kind of constitution the clubs had, and whether they were societies registered under any Act like the Co-operative Societies Act. Field, J., in *Graff* v. *Evans*[1] observes as follows :

> " It is not disputed that the club was a *bona fide* club. The club property by the rules was vested in certain trustees, no doubt for the purpose, as was suggested in argument, of enabling them to sue or take other legal proceedings both of a civil and criminal nature with respect to injuries to the possession of the goods belonging to the club. No doubt other special properties in the goods of the club are created and given to officers of the club other than the trustees. Thus the treasurer has a special property in the funds of the club, and the manager has a special property in the liquors, and may part with them without the permission of the trustees. He acts for the committee, who are his masters, as are also in a sense all members of the club. The goods would, I presume, be brought by the committee and paid for by cheque out of the funds of the club."

Further on the learned Judge observes :

> " The Legislature have come to the conclusion that it is unadvisable that intoxicating liquors should be sold anywhere without a licence. The enactment is limited to 'sales' of intoxicating liquors, and only seems *aimed at sales by the retail traders*, because the wholesale trader is not touched. The question here is, did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail ? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price."

This decision has been followed in *Humphrey* v. *Tudgay*[2]. Can it be said that these cases apply *ad idem* to a co-operative society registered under Act VI of 1932 ? I think not. The ownership of the milk in the present case is in the corporate body and not in the group of members as in the case of a club. There is no joint ownership. Section 20 is very general and imparts a corporate character to the society which can own property and transact business, quite irrespective of its members. There is no resemblance between such a society and an ordinary club.

1. (1881-82) 8 Q.B. 373. 2. (1915) 1 K.B. 119.

As in the case of the clubs above referred to, the society does not create any rights in the properties in favour of a member or members. I am therefore of opinion that the transaction of the delivery of milk to Venkatasubbayya for a price during which time P.W. 1 purchased a quantity is a sale within the meaning of the Act.

The further question has been raised by Mr. Krishnamurthi that the transaction whereby the Sanitary Inspector got a quantity of milk was in any event not a sale. In *Public Prosecutor* v. *Narayana Singh*[1], Kuppuswami Aiyar, J., has held that when a Sanitary Inspector purchased milk from the accused, tested it and found that it was adulterated, the transaction amounted to a purchase and therefore the accused was guilty under rule 29 (*b*) of the Rules and section 5 (1) (*b*) read with rule 27 of the Madras Prevention of Adulteration Act. Moreover, in this case, Ex. P-2 the receipt contains an admission by the second accused that he was selling buffalo milk to the Maruthi Vilas Coffee Hotel and the transaction by which P.W. 1 got the sample is also admitted to be a sale. Apart from the admission contained in Ex. P-2 when Mr. Venkatasubbayya exchanged money consideration for the milk, he was acting as a purchaser and the society, a separate legal entity was performing a contract of sale in delivering milk. Therefore it may even be unnecessary to decide whether the transaction with P.W. 1 was a sale at all, even though I am convinced that it is also a sale. In these circumstances, I cannot uphold the order of acquittal which is therefore set aside and the second respondent is convicted under section 5 (1) (*b*) of the Madras Prevention of Adulteration Act and sentenced to pay a fine of Rs. 5 or in default to undergo simple imprisonment for a period of one week.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SHAHABUDDIN.

Krishna Udayan .. *Petitioner**

v.

Chinna Pillai .. *Respondent.*

Land Acquisition Act (I of 1894), *section* 30—Ex parte *order disposing of reference on respondent's vakil reporting no instructions—Application to set aside—Maintainability —Rejection of application—Appealability —Civil Procedure Code (V of* 1908), *Order* 9, *rule* 13, *Order* 17, *rules* 2 *and* 3 *and Order* 43, *rule* 1 (d)—*Applicability.*

An *ex parte* order (that the petitioner was entitled to the amount awarded) in a reference under section 30 of the Land Acquisition Act on the vakil for the respondent reporting no instructions and the petitioner proving his claim is a decree (and not an award against which, only an appeal lies) and consequently Order 9, rule 13 of the Civil Procedure Code does apply and an application for setting aside the *ex parte* order is competent.

An appeal against the rejection of the application to set aside the *ex parte* order is also competent under Order 43, rule 1 (*d*) of the Code as there is nothing in the Land Acquisition Act which is inconsistent either with Order 9, rule 13 or with Order 43, rule 1 (*d*) of the Code.

The *ex parte* order is one which falls under rule 2 and not under rule 3 of Order 17 of the Code, though the respondent had failed to pay day costs ordered to be paid while granting a previous adjournment.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, Salem, dated 24th August, 1946, in C. M. A. No. 13 of 1946 (I. A. No. 419 of 1945 in L. A. C. No. 7 of 1945, Sub-Court, Salem).

K. V. Ramachandra Aiyar for Petitioner.

N. Sivaramakrishna Aiyar for Respondent.

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1. (1944) 1 M.L.J. 16.

*C.R.P. No. 1107 of 1946. 22nd September, 1947.

The Court delivered the following

JUDGMENT.—This petition arises out of an application for setting aside an order passed *ex parte* on a reference (L. A. C. No. 7 of 1945) under section 30 of the Land Acquisition Act. The petitioner and the respondent were claimants in respect of the amount awarded and the reference made in that connection to the Subordinate Judge of Salem under section 30, stood posted to the 24th of August, 1945, when the respondent filed his statement. The proceedings were then adjourned to 19th September, 1945. On that day, the respondent was absent and an adjournment asked for on his behalf was granted till 2nd October, 1945, on condition that he paid Rs. 4 to the petitioner as costs for the day. But on 2nd October, 1945, the respondent was again absent and his vakil reported 'No instructions.' The day costs was not paid. The petitioner then proved his claim and an order was passed in his favour, the Court holding that he was entitled to the amount in dispute. The respondent thereupon filed a petition under Order 9, rule 13 of the Code of Civil Procedure to set aside the order passed in favour of the petitioner. The Subordinate Judge dismissed this petition taking the view that the order disposing of the reference under section 30 of the Land Acquisition Act was one on merits and fell under Order 17, rule 3, Civil Procedure Code in view of the fact that the respondent who had been asked to pay the day costs committed default. He appears to have regarded the direction regarding day costs as a condition precedent. On appeal by the respondent the learned District Judge held that the Order in L. A. C. No. 7 of 1945 was an order passed *ex parte* coming within rule 2 of Order 17, Civil Procedure Code. He therefore remanded the application for disposal on the merits as the learned Subordinate Judge had not considered the question whether the respondent had sufficient cause for his non-appearance on the 2nd October. It is against this order of remand that this Civil Revision Petition has been filed.

It is contended on behalf of the petitioner that in respect of proceedings under section 30 of the Land Acquisition Act the only remedy open to a claimant is to treat the order against him as part of the award and appeal under section 54 of the Land Acquisition Act to this Court, and that Order 9, rule 13, Civil Procedure Code does not apply to such proceedings. This contention cannot be accepted in view of the decision of a Bench of this Court in *Chikkanna* v. *Perumal*[1]. There, it was held that a Subordinate Judge appointed by the Provincial Government under section 3 (*d*) of the Land Acquisition Act to decide a dispute referred under section 30 of the Act is a Civil Court and that the decision therein is a decree and an appeal lies from such decision as an appeal against a decree. It is there observed that in the light of the Privy Council decision in *Ramachandra Rao* v. *Ramachandra Rao*[2], an order determining a reference under section 30 is to be regarded as a decree and not as an award. In this view the order of the Subordinate Judge passed on 2nd October, 1945, is a decree, and consequently Order 9, rule 13, Civil Procedure Code which empowers the Court to set aside a decree passed *ex parte* does apply. I therefore consider that the application before the learned Subordinate Judge for setting aside this order was competent.

It is then argued that even if Order 9, rule 13, Civil Procedure Code applies it does not follow that Order 43, rule 1 (*d*) Civil Procedure Code under which orders under rule 13 of Order 9 rejecting an application for setting aside an *ex parte* decree are appealable, is applicable as the right of appeal is a creature of the statute and there is no provision in the Land Acquisition Act conferring such a right on a claimant. In support of this contention reliance is placed on the decision of a Bench of this Court in *Suryanarayanamurthi* v. *Satyanarayanamurthi*[3], where in respect of an application under the Madras Agriculturists' Relief Act it was held that although section 19-A sub-section (8) of that Act made the provisions of Order 9, rule 13 applicable to proceedings under the Act it could not attract the right of

1. (1940) 1 M.L.J. 732 : I.L.R. 1940 Mad. 791 (F.B.).
2. (1922) 43 M.L.J. 78 : I.L.R. 45 Mad. 320 : L.R. 49 I.A. 129 (P.C.).
3. (1946) 1 M.L.J. 54.

appeal conferred under Order 43, rule 1 (*d*) Civil Procedure Code. But this decision in my opinion does not apply to the facts of the present case. There, two provisions were considered with regard to the appealability of an order declining to set aside an *ex parte* order passed under Act IV of 1938: one was section 141 of the Code of Civil Procedure and the other sub-section (8) of section 19-A of the Agriculturists' Relief Act and it was observed that it was difficult to see how either of these provisions which only made the procedural provisions of the Code applicable to proceedings under the Act should attract the substantive right of appeal. Section 141 of the Code of Civil Procedure makes the procedure provided in the Code in regard to suits applicable as far as it can be made applicable to all proceedings in any Court of Civil Jurisdiction. Similarly, sub-section (8) of section 19-A of the Agriculturists' Relief Act is to the effect that the procedure laid down in the Civil Procedure Code for the trial of a suit shall as far as may be, apply to applications under that section. But section 53 of the Land Acquisition Act which governs the present case is not as restrictive as either of the abovementioned provisions. Section 53 is in these words :

> " Save in so far as they may be inconsistent with anything contained in this Act the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act."

I have not been shown any provision in the Land Acquistion Act which is inconsistent either with Order 9, rule 13 or with Order 43, rule 1 (*d*), Civil Procedure Code. I therefore consider that the appeal to the District Judge was competent.

Lastly, it is argued that the disposal of the reference was under Order 17, rule 3 and not Order 17, rule 2, Civil Procedure Code and therefore the learned Subordinate Judge was right in dismissing the application. I am unable to accept this contention also. It is no doubt true that the respondent did not pay the petitioner the day costs as directed on 19th September, 1945, but it does not appear from the order awarding those costs that its. payment was a condition precedent. Even if it were, it is clear from the Bench dicision in *Ellammal* v. *Karuppan Chetty*[1], relied on by the learned District Judge that :

> " Where no default occurring under rule 2, default occurs under rule 3, the Court should proceed under the latter provision and dispose of the case on the merits ; but if the default consists in non-appearance, it is rule 2 which deals with such a case specifically that in terms applies."

The decision of a single Judge in *Virayya* v. *Nagayya*[2], cited by the learned Subordinate Judge does not appear to apply to the facts of the present case. There, the parties were represented and there was no default of appearance.

I therefore see no reason to interfere. The Civil Revision Petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

Venkoba Rao and others .. *Petitioners.**

Madras City Police Act (III of 1888), *sections* 42 *and* 43 —*Warrant under section* 42—*If should state that the person issuing it has reason to believe that the place to be searched was used as a common gaming-house —Presumption under section* 43, *that the place was used as common gaming-house—When permissible—Madras Gaming Act (III of* 1930), *sections* 5 *and* 6.

A warrant issued under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act is not invalid simply for the reason that it is not stated therein that the authority which has issued the warrant has reason to believe that the place in question is used as a common gaming house.

Re *A. Perayya,* (1946) 1 M.L.J. 436 ; In re *Kulandaivelu Chettiar,* (1938) 2 M.L.J. 266 ; In re *Naranappayya,* (1938) 1 M.L.J. 509 and *Subramania Aiyar* v. *Emperor,* (1935). 69 M.L.J. 835 approved.

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1. (1936) 70 M.L.J. 688. 2. (1936) M.W.N. 1230.

*Crl.R.C. Nos. 732 and 1333 of 1947
(Crl. R.P. No. 626 of 1947 and Taken up No. 12 of 1947 respectively). 2nd December, 1947.

Thambi Iyengar, In re, (1945) 2 M.L.J. 537 not followed.

In the case of the issue of a warrant under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act there are really two acts that have to be performed, a judicial act and an official act. The official act is the issue of the warrant itself in due form over the signature of the Magistrate and the judicial act is the satisfying of himself by the Magistrate that there is reason to believe that the place in question is used as a common gaming-house. Since no special form for a warrant under section 42 of the City Police Act is prescribed, it no doubt may be presumed that the official act was duly performed; and if the Magistrate had stated that he had reason to believe that the place in question was used as a common gaming-house, the judicial act could also be presumed under section 114 of the Evidence Act to have been regularly performed. Where, however, it is not stated, that the Magistrate has reason to believe that the place is used as a common gaming-house it cannot be said that the presumption should necessarily be drawn, if the warrant is challenged, that the Magistrate had reason to believe that the place was used as a common gaming-house. If the Magistrate has not chosen to state that he has "reason to believe" then the presumption need not be drawn unless evidence is adduced that in fact the warrant was issued on proper information. All that is necessary, if the Magistrate has not stated himself that he had reason to believe that the place was used as a common gaming house, is for the Court to be satisfied that the Magistrate was aware of the serious step he was taking and that he had reason to believe that the information which was given him was true. It will not usually be necessary to require that the material on which the Magistrate acted should be divulged.

Where the evidence shows that the Deputy Commissioner of Police issued such a warrant on no other information than the hearsay statement of the Sub-Inspector which had not been verified, it cannot be held that the Deputy Commissioner had reason to believe that the place was used as a common gaming-house and accordingly the presumption under section 43 of the City Police Act that the premises were being used as a common gaming-house cannot be drawn.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Second Presidency Magistrate of the Court of the Presidency Magistrate, George Town, Madras, dated the 7th day of February, 1947, and passed in C.C. No. 34 of 1946.

B. T. Sundararajan for Petitioners.

P. Chandra Reddy for the Crown Prosecutor on behalf of the Crown.

The Order of the Court was made by

Happell, J.—Criminal Revision Case No. 732 of 1947 arises out of the conviction of six persons by the Second Presidency Magistrate, Madras, for an offence under sections 45 and 46 of the Madras City Police Act. Each of the accused was sentenced to pay a fine of Rs. 25, or in default to undergo two weeks' rigorous imprisonment. The petition has been filed by the 1st accused.

On 22nd October, 1946, a Sub-Inspector of the Madras Police obtained a warrant from the Deputy Commissioner of Police, Law and Order, and in pursuance of it, entered No. 7, Vaikunta Vadhyar Street and conducted a search. According to the evidence, he found the six accused playing cards for money in a room in a house which belonged to the first accused, and he seized the cards with which they were playing and some cash. Section 42 of the Madras City Police Act which, it may be stated here, is equivalent to section 5 of the Madras Gaming Act of 1930, provides that:

"(1) If the Commissioner has reason to believe that any place is used as a common gaming-house, he may by his warrant give authority to any police Officer, above the rank of a constable to enter, with such assistance as may be found necessary, by night or by day and by force if necessary any such place, and to arrest all persons found therein and to seize all instruments of gaming and all moneys and securities for money and articles of value reasonably suspected to have been used or intended to be used for the purposes of gaming which are found therein, and to search all parts of such place and also the persons found therein."

Section 43 of the Act provides that any cards, dice, etc., or other instruments of gaming found in any place entered or searched under the provisions of section 42, or on any person found therein, shall be evidence that such place is used as a common gaming-house, and that the persons found therein were there present for the purposes of gaming, although no play was actually seen by the police officer or any of his assistants. In the case before us, it was not proved directly that the first accused was using the premises for his own profit or gain; but the Magistrate, as there was no evidence in rebuttal, drew the presumption under section 43 of the Act that the premises were being used as a common gaming-house.

It was argued before the Second Presidency Magistrate that the warrant was invalid, because it did not specifically state that the Deputy Commissioner had reason to believe that the premises in question were being used as a common gaming-house, and that that being so, no presumption under section 43 of the Act could arise. The warrant, Ex. P-1 issued by the Deputy Commissioner was in this form :

"Whereas information has this day been laid before the undersigned, Commissioner of Police and Justice of the Peace for the Town of Madras, that a common gaming-house is kept on the premises occupied by Venkoba Rao . . . . . These are therefore to command you forthwith to enter the said premises with such assistance as may be found necessary and to take into custody all persons who may be found therein. . . . . ."

It is not stated in the warrant that the Commissioner of Police had reason to believe that the place was used as a common gaming-house and the material on the basis of which he issued the warrant is not set out. The same argument has been addressed to us and the only question which we have to decide is whether the warrant was invalid because it was not stated therein that the Commissioner had reason to believe that No. 7, Vaikunta Vadhyar Street, was being used as a common gaming-house. The second Presidency Magistrate held that the warrant issued was valid and that the presumption under section 43 could be drawn on the authority of two decisions of this Court *In re P. R. Subbier*[1], and *Crown Prosecutor, Madras* v. *Syed Cassim and others*[2]. In addition to these decisions, our attention has been drawn to several other decisions on the question of the form of warrant issued under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act. In *In re P. R. Subbier*[1], referred to by the Magistrate, it was held by Cornish, J., that it was not necessary for it to be stated in the warrant that the Magistrate had reason to believe the information on the basis of which the warrant was issued. It was sufficient, the learned Judge was of opinion, for it to be stated that he had issued the warrant on information laid before him. In *Crown Prosecutor, Madras* v. *Syed Cassim and others*[2], K. S. Menon, J., also held that the section did not require that it should be stated in the warrant that the Commissioner had reason to believe that the place was used as a common gaming-house. In this case, however, the learned Judge did consider evidence in regard to the information on which the warrant was issued and found that it was sufficient to give the Commissioner reason to believe that the place in respect of which the warrant was sought was used as a common gaming-house. The consensus of authority is undoubtedly that a warrant issued under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act is not invalid simply for the reason that it is not stated therein that the authority which has issued the warrant has reason to believe that the place in question is used as a common gaming-house. Vide *Re. A. Perayya*[3], *In re Kulandaivelu Chettiar*[4], *In re Naranappayya*[5], and *Subramania Iyer* v. *Emperor*[6]. *In Thambi Iyengar in re*[7], Chandrasekhara Aiyar, J., no doubt did state that the presumption under section 6 of the Madras Gaming Act will only apply if there is proper compliance with section 5. In the case before him, the failure to comply properly with the provisions of section 5 of the Madras Gaming Act was the failure to state that the Deputy Superintendent of Police who issued the warrant had reason to believe that the house in question was being used as a common gaming-house, and the learned Judge held that in the absence of a statement in the warrant that the Deputy Superintendent of Police who issued it had reason to believe that the house was being used as a common gaming-house the presumption under section 6 could not be drawn. Chandrasekhara Aiyar, J., in his judgment in this case, does not refer to any decisions on the topic.

We are in agreement with the view that a warrant is not necessarily invalid because it does not state that the Magistrate has reason to believe that the place was used as a common gaming house. The section does not require the Magistrate

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1. (1934) 68 M.L.J. 348 ; I.L.R. 58 Mad. 867.
2. (1936) M.W.N. 214.
3. (1946) 1 M.L.J. 436.
4. (1938) 2 M.L.J. 266.
5. (1938) 1 M.L.J. 509.
6. (1935) 69 M.L.J. 835.
7. (1945) 2 M.L.J. 537.

to record his reasons for believing any information that the police might have given him. The real question seems to us to be whether, provided that the warrant purports to be issued under section 5 of the Gaming Act or section 42 of the Madras City Police Act the presumption under section 6 or section 43 must necessarily be drawn, or whether the prosecution can be required to prove that the Magistrate in fact did have reason to believe that the place was used as a common gaming house. The issue of a warrant under section 42 or section 5 carries with it consequences of the greatest importance, since if the warrant is valid the ordinary presumption of innocence in the case of the persons affected is removed and, provided that instruments of gaming are found, and these instruments may be articles of so ordinary a character as playing cards, the persons found in the place are presumed to be present for the purpose of gaming unless they can prove the contrary. It is manifest, therefore, that the provisions of the section, whether section 42 of the Police Act or section 5, of the Madras Gaming Act under which the warrant is issued should be strictly complied with. In *In re Kulandaivelu*[1], Horwill, J., rejected the contention that there must be some evidence before the prosecution that the warrant was issued under section 5 upon proper information sufficient to lead a Magistrate to believe that the room in question was used as a common gaming-house. He was of opinion that the presumption raised under section 114 (*e*) of the Evidence Act should be applied and that it would be against public policy if the prosecution were compelled to let in evidence in regard to the material on which the Magistrate acted. A similar view was expressed by Kuppuswami Aiyar, J., in *In re A. Perayya*[2], in which he stated that it was not necessary to record the material on the basis of which the warrant was issued, as the Magistrate was presumed to know the law and the requirements of the section. In neither of these cases was the actual form of the warrant in question set out, and the argument advanced seems to have been that, whatever the form the accused could insist that evidence should be adduced that the warrant was issued upon proper information. In the case of the issue of a warrant under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act, there are really two acts that have to be performed, a judicial act and an official act. The official act is the issue of the warrant itself in due form over the signature of the Magistrate, and the judicial act is the satisfying of himself by the Magistrate that there is reason to believe that the place in question is used as a common gaming-house. In the present case, it no doubt may be presumed, since no special form for the warrant is prescribed, that the official act was duly performed ; and if the Magistrate had stated that he had reason to believe that the place in question was used as a common gaming-house, the Judicial act could also be presumed under section 114 of the Evidence Act to have been regularly performed. Where, however, as in the present case, it is not stated that the Magistrate has reason to believe that the place is used as a common gaming-house, we do not see, having regard to the fact that the requirements of the sections must be strictly complied with, that the presumption should necessarily be drawn, if the warrant is challenged, that the Magistrate had reason to believe that the place was used as a common gaming-house. If the Magistrate has not chosen to state that he has "reason to believe" then the presumption need not be drawn unless evidence is adduced that in fact the warrant was issued on proper information. This seems to have been the view taken by King, J., in *Subramania Aiyar* v. *Emperor*[3], In that case, King, J., held that the fact that the warrant did not contain the words "reason to believe" did not invalidate it and that the mere omission of the particular words in the warrant was by no means conclusive, the real question being whether as a matter of fact the Magistrate had or had not reason to believe. King, J., then examined the evidence and, finding among other things that the Magistrate had examined the Sub-Inspector on oath, observed that it was impossible to argue on these facts that the Magistrate was not aware of the serious step he was taking and that he had no reason to believe that the information that was given

1. (1938) 2 M.L.J. 266.
2. (1946) 1 M.L.J. 436.
3. (1935) 69 M.L.J. 835.

him was not true. He held, therefore, that the warrant satisfied the provisions of section 5 of the Act. With respect, we agree with Horwill, J., in the case referred to above, that it would be against public policy if the prosecution were compelled to let in evidence in regard to the material on which a Magistrate acted. In our opinion, however, it will not usually be necessary to require that the material should be divulged. All that is necessary, if the Magistrate has not stated himself that he had reason to believe that the place was used as a common gaming-house, is for the Court to be satisfied, in the words used by King, J., that the Magistrate was aware of the serious nature of the step he was taking and that he had reason to believe that the information which was given him was true. In the case of *Subramania Aiyar* v. *Emperor*[1], the fact that the Magistrate had examined the sub-inspector on oath showed conclusively that he was aware of the serious nature of the step he was taking and that it was necessary for him to satisfy himself that the information given him appeared to be true. In the present case, the evidence is that the sub-inspector, on information given to him that No. 7, Vaikunta Vadhyar Street, was being used as a common gaming-house, went straight to the Deputy Commissioner without himself verifying the information and obtained the warrant on which he acted. There is no other evidence than this, and as it appears that the Deputy Commissioner issued the warrant on no other information than the hearsay statement of the sub-inspector which the sub-inspector had not verified, we are unable to hold that in this case the Deputy Commissioner had reason to believe that the place was used as a common gaming-house. In that view, the presumption under section 43 cannot be drawn, and as the Magistrate convicted the petitioner on the basis of the presumption and not on the basis of evidence that he was using the premises as a common gaming-house, his conviction must be set aside. The cases of the other accused are not distinguishable from that of the petitioner, we have called their cases up, and we also set aside their convictions. The revision petition is allowed.

K.S. *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI AND MR. JUSTICE GOVINDA MENON.

S. Rama Iyer .. *Petitioner**

v.

K. V. Nataraja Iyer .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 491—*Boy under* 14 *years of age detained with his free will in his maternal grandfather's house—If illegal detention—Application under section* 491 *by father for custody—Sustainability—Considerations—Availability of remedy by way of guardianship proceedings—If bar to remedy under section* 491, *Criminal Procedure Code.*

A minor under 14 years of age has no will of his own and his detention against his father's will is unlawful. Where the attitude of such a minor boy (in preferring to stay with his maternal grandfather and being unwilling to go back to his father) is induced by his maternal grandfather, and as even otherwise the minor's opinion is not entitled to any weight, the maternal grandfather's custody with the minor's free will must be deemed to be illegal as against the father and natural guardian who seeks his custody. It cannot be contended that in so far as it is open to the father to apply for being appointed as guardian of the person of the minor under the Guardians and Wards Act, and so long as such remedy is available, section 491, Criminal Procedure Code is not a proper remedy to be invoked. It did not matter how many remedies were open to a person ; he is entitled to avail himself of any one of them.

It cannot be said that the father by marrying a second wife or even by his ill-treating the child's mother during her lifetime (assuming the ill-treatment alleged to be true) has rendered himself unfit to have the custody of his child.

Case-law reviewed.

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1. (1935) 69 M. L. J. 835.

*Crl. Miscellaneous Petition No. 1362 of 1947. 28th November, 1947.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions of the nature of a *Habeas Corpus* directing the respondent to bring up minor Jayaram before this Court for being dealt with according to law and for restoring him to the custody of the petitioner herein.

K. V. Ramachandra Iyer and *T. N. Sundaresa Iyer* for Petitioner.

T. L. Venkatarama Aiyar and *G. R. Jagadesa Aiyar* for Respondent.

The Court made the following

ORDER.—This is an application under section 491, Criminal Procedure Code, for a direction that a minor boy named Jayaram who is the petitioner's son be brought up before the Court to be dealt with according to law, and that the respondent be directed to restore the said Jayaram to the custody of the petitioner. At one stage it was agreed between the parties that the boy who is 13 years old should be put in the Sri Ramakrishna Mission High School Hostel, Thiagarayanagar, and the father was willing to bear all the expenses of the maintenance and education of the boy in that institution. After his admission in the hostel and the school, in spite of numerous attempts made by the warden, the boy played truant and was persistently running away to the respondent's place. Consequently the consent order was vacated on the 26th September, 1947 and the petition was heard on merits. It was, however, agreed that before passing the final order one further attempt should be made to put the boy in the hostel and in spite of the previous conduct of the boy, the warden was so good as to re-admit him but again on several occasions, the boy ran away and finally the respondent removed him from the hostel. We felt convinced that the truancy of the boy, his disinclination to study and his aversion to his father were the result of the prenicious influence of his maternal grand-parents. On the 20th November, 1947, we made the following order on the petition :

> " We think that the petitioner is entitled to the order he asks for in this petition. We direct that the boy Jayaram be handed over to his father, the petitioner, now in Court."

We notified when this order was passed that we would announce our reasons later and we proceed to do so now.

The minor Jayaram was born on 11th March, 1934. His mother Meenakshisundarammal died in May 1942 and the petitioner married his second wife Saradambal in July, 1943, and has now two children by her. The respondent is the father of Meenakshisundarammal. The petitioner's father is alive and he lives in Aiyoor Agaram which is near Villupuram. The respondent's village Kandampakkam is four miles from Aiyoor Agaram. The petitioner's case is that he brought up the boy and educated him up to the third form in which class he was to join after the summer recess of 1947. The boy was sent as usual to Aiyoor Agaram to spend a portion of the vacation and from there he was to go with his step-mother to her father's place, Tiruvannamalai and return in time to rejoin the school. When he was at Aiyoor Agaram, the respondent approached the petitioner's father and asked him to send the boy with him ; but the latter said that the boy had to go to Tiruvannamalai for sometime and that after his return from that place, the boy could be taken by the respondent provided that he was sent back within a few days before the re-opening of the school. The respondent consented and took the boy, but in spite of the termination of the vacation, the boy was not sent. Messages from the petitioner proved of no avail and ultimately a lawyer's notice had to be sent. In the reply to the lawyer's notice allegations were made by the respondent of the ill-treatment of the boy by the petitioner and his second wife and of an attempted alienation by the petitioner and his father of properties alleged to belong to the joint family. There was also an averment that the petitioner had ill-treated the minor's mother during her lifetime.

While this correspondence was going on, the respondent tried to obtain a school transfer certificate from the authorities of the A.R.C. school where Jayaram

was studying. On their refusal to issue the certificate except with the permission of the father, the respondent had a notice sent through a lawyer to the authorities of the school threatening to take action against them. He also addressed petitions in that behalf to the District Educational Officer and to the Director of Public Instruction. In the letter written to the Headmaster of the school, the respondent stated that he wanted to get the boy admitted in a school in Kolar where his son is employed. It is urged by the petitioner that after having removed the boy on a false pretence that he would be sent back within ten days, attempts were made by the respondent to obtain a transfer certificate and to send him away to Mysore State in order to place him beyond the reach of this Court. In the reply affidavit filed by the petitioner, it is alleged that the boy has been illegally and improperly detained by the respondent in his custody without the consent of the father, that there is no secondary school at Kandampakkam where the boy could continue his studies and that the nearest school is at Villupuram which is about four miles away. It is further alleged *inter alia* that the respondent is a man of no means, that he is heavily indebted, that he even borrowed Rs. 400 from the petitioner in 1941 and repaid it in instalments up to 1944 only partially. The respondent is of a garrulous nature and got entangled in a criminal case and has been making desperate attempts to separate the petitioner from his father. As regards the charge of the respondent that the petitioner and his father are trying to alienate joint family properties to the detriment of the minor's interests, the petitioner says that the properties were acquired by his father and that he had no interest in them and that by setting up the false claim, the respondent was jeopardising the interests of the minor by alienating the sympathies of his paternal grandfather. With reference to the alleged ill-treatment by the petitioner and his second wife, the allegation has been emphatically denied and a number of affidavits have been filed in support of the denial. An officer who is holding the office of Huzur Sheristadar of the Collector's office, the petitioner, being the Collector's karnam, an opulent landlord belonging to the Beri Chetti caste and an aged Telugu Brahmin lady who is a neighbour, have testified to the fact that the boy was being well treated by his father and his step-mother. There is no evidence *per contra* on the respondent's side with regard to any of the matters averred by him in his counter-affidavit. We are on the whole inclined to accept the version of facts given by the petitioner with regard to all the matters referred to above. In the matter of the ill-treatment meted out by the petitioner to his deceased first wife, we accept the petitioner's denial. We wish to observe that even if true, that would be no valid ground for refusing custody to the natural guardian of his minor child.

There are two legal objections stressed on behalf of the respondent. The first is that the procedure under section 491, Criminal Procedure Code, is not applicable as there is no illegal detention in this case and a writ of the nature of *habeas corpus* can only be issued where there is some illegal restraint. It is argued that the boy went to the respondent's house of his own accord and is not only staying there out of his own free will but is obstinately averse to his going back to his father. The sole consideration in such matters being the welfare of the minor, the boy who is sufficiently old and capable of forming an intelligent preference should not be compelled to live in a custody which is not to his liking. The second contention is that it is open to the petitioner to apply for being appointed as guardian of the person of the minor under the Guardians and Wards Act and so long as such a remedy is available, section 491, Criminal Procedure Code, is not a proper remedy to be invoked. We find no substance in any of these contentions.

Judging the matter entirely from the point of view of the welfare of the minor, it is manifest that during the short time that the minor has been with the respondent, he has completely lost his aptitude for study and has been playing a truant although just prior to that he was making good progress in the school. As we have stated, there is no secondary school at Kandampakkam where he can continue his further studies. There is the further fact that, as we have noticed ourselves, the boy is being brought up in an atmosphere of utter estrangement, if not enmity, towards

his father and father's father. The utter lack of *bona fides* on the part of the respondent is evident from a number of factors. The respondent admits in his counter-affidavit that for some four or five years previously the boy had not been sent to him during the summer vacation. It is therefore exceedingly probable that he made a false promise to the petitioner's father that he would send the boy back within a few days and thus removed him by a ruse and thereafter he was preparing to go to the length of taking him away altogether out of the jurisdiction of this Court. That he did not do so with the best of intentions is evident from the fact that he set up a claim for property on behalf of the minor. The contention that his purpose in obtaining unlawful custody of the boy was to exploit this claim seems to be well-founded. Undoubtedly the minor, after his short stay with his grandfather, has expressed a preference to remain there and his unwillingness to go back to his father. But that we cannot say is an intelligent preference because the boy is under 14 years and as it has been repeatedly held, a child of that tender age cannot be said to be able to form an intelligent preference particularly in a matter relating to his custody as against the wishes of his natural parents. As early as *Reade* v. *Krishna*[1], Muttusami Ayyar and Brandt, JJ., held that there could be no doubt that a minor under 14 years of age has no will of his own, or that his detention against his father's will is unlawful. The learned Judges after referring to several English cases said this :

"As observed by Lord Campbell in the *Queen* v. *Clarke*[2], the guardian for nurture has by law a right to the custody of the child and may maintain an action of trespass against a stranger who takes the child. With reference to such child brought up on a writ of *habeas corpus*, the learned Chief Justice said : ' the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian, and when it is delivered to him the child is supposed to be set at liberty.' He deprecates the contention, that the capacity of the child to make a choice for itself should be tested by the Judges, and observes that ' the consequences which would follow from allowing such choice would be most alarming.' Nor is there room for doubt that when the father is entitled to the custody of the child, the proper mode of enforcing his right consists in a decree for its delivery. The order usually made on a *habeas corpus*, when the child is too young to elect its own custody, is a direction that the child be delivered to its lawful guardian."

In the *King* v. *Greenhill*[3], Coleridge, J., said :

" a *habeas corpus* proceeds on the fact of an illegal restraint. When the writ if obeyed, and the party brought up is capable of using a discretion, the rule is simple, *viz*., the individual who has been under the restraint is declared at liberty, and the Court will even direct that the party shall be attended home by an officer to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists ; and where the child is in the hands of a third person, that presumption is in favour of the father."

Similar observations from a number of other cases have been collected in *Reade* v. *Krishna*[1] and the conclusion is set out in these words :

" The result then of the examination of the authorities to which we were referred is, that according to the latest decision in this Presidency and Bombay, a minor though over 14 is not at liberty to choose his own custody as against the father, even when brought up on the writ of *habeas corpus*, that the decisions to the contrary proceed on the view that the writ is not the appropriate remedy prescribed for enforcing the authority of the father over his son, and that when the son is over 14 and competent to make a choice, its purpose is satisfied by allowing him to choose his own custody, and leaving it to the father to vindicate his right by a Civil Suit. It follows then that the contention that according to general principles the father's guardianship ceases (quoad his right to custody) when the son completes his 14th year, cannot be supported."

The same view was adopted in this Court in *Subbuswami Goundan* v. *Hemakshi Ammal*[4] by Beasley, C.J. and Ananthakrishna Aiyar, J. There the minor was a girl of 13 and the contest with regard to her custody was between her husband who was the petitioner and her mother and step-brother who were the respondents. It was alleged that the young girl was extremely self-willed and under no circumstances would she ever think of or be willing to return to her husband, the reason being that she feared a further outbreak of ill-treatment. It was, on this ground, contended that there was no detention. On the contrary the respondents were

1. (1886) I.L.R. 9 Mad. 391.
2. (1857) 7 E. & B. 186 : 119 E.R. 1217.
3. (1836) 4 A. & E. 624 at 643 : 111 E.R. 922.
4. (1929) 57 M.L.J. 642 : I.L.R. 53 Mad. 72.

too willing that she should return to her husband and her stay with the respondents was out of her own free will. Upon the facts that transpired before them the learned Judges found that that attitude of the girl was not genuine but was induced by her mother and her step-brother. Nevertheless they considered what the effect of her declaration was and said :

> " If, however, this declaration of the wife that she was not willing to return to her husband were true, then we would have to consider what the duty of the Court is. Whilst it is quite unnecessary in our view of the circumstances, to consider that position, we must state that we consider that in the case of a girl of only 13 years of age, her consent or otherwise is quite immaterial. What we would have to consider would be the welfare of the minor wife and in doing so the fact that she prefers to reside elsewhere than with her husband, although, had she been old enough to form a good opinion, this would have been a very important circumstance for consideration, would not in our view be entitled to very much or any weight at all."

In the present case also we are definitely of the opinion that the present attitude of the boy is induced by his maternal grandfather. But even otherwise we agree with great respect with the learned Judges who decided the two cases cited above that the minor's opinion in circumstances such as are found in this case is not entitled to any weight at all. When thus the so-called consent of the minor has become ineffective, his detention even if he remains in the respondent's custody of his free will must be deemed to be illegal as against a person who is better entitled in law to have his custody and who is desirous to take the minor into his custody (see *Abraham* v. *Mahtabo*[1] and *Subbuswami Goundan* v. *Kamakshi Ammal*[2]).

Turning to the second contention it may be remarked that this argument was also raised in *Subbuswami Goundan* v. *Kamakshi Ammal*[2], but negatived on the ground that so long as the remedy under section 491, Criminal Procedure Code, is one which is open to the petitioner, the respondents cannot be heard to say that, where there is a remedy provided by law, that remedy should not be resorted to merely because there is another remedy which is less expensive and less threatening. Bacon, V.C., in *Byrant* v. *Bull*[3], said when he had to deal with a similar argument, that it did not matter how many remedies were open to a person—there might be 5,000—he was entitled to avail himself of any one of them and that what had to be shown was that the remedy that he did avail himself of was not open to him.

Before concluding we would refer to a case which upon its facts comes nearest to the present case. In *Atchayya* v. *Kosaraju Narahari*[4], on a contest for the custody of a male infant between the father and the maternal grandfather, the contention was raised of ill-treatment of the child's mother who was the first wife of the petitioner and it was urged that the child preferred the custody of the grandmother having lived with her almost from its birth. There were however some complications in that case about a partition suit that was filed against the father on behalf of the minor. Madhavan Nair and Thiruvenkatachariar, JJ., referred to the rights and duties of the guardian of the person of an infant under the Hindu law and pointed out that the guardian has a *prima facie* right to the possession of the infant and he cannot be deprived of it even by the desire of the minor himself except upon sufficient grounds. His guardianship is in the nature of a sacred trust and if he entrusts it to the custody of anybody that authority is essentially a revocable authority. With reference to the other objections raised therein, the learned Judges said :

> " It cannot in our opinion be successfully contended that either by his marrying a second wife who is now living with him or by his having ill-treated the child's mother during her lifetime (even assuming the ill-treatment to be true), he has rendered himself unfit to have the custody of his child. On this point we agree with the decision of Seshagiri Aiyar and Napier, JJ., in *Audiappa Pillai* v. *Nallendrani Pillai*[5], which dissents from *Bindo* v. *Sham Lal*[6]. The case in *Sukhadeo Rai* v. *Ramachandra Rai*[7] is also in support of the same view."

In *Audiappa Pillai* v. *Nallendrani Pillai*[5], it was pointed out that

1. (1889) I.L.R. 16 Cal. 487.
2. (1929) 57 M.L.J. 642 : I.L.R. 53 Mad. 72 at p. 80.
3. (1879) 10 Ch.D. 155.
4. A.I.R. 1929 Mad. 81.
5. (1915) 28 M.L.J. 442 : I.L.R. 39 Mad. 473.
6. (1907) I.L.R. 29 All. 210.
7. (1924) I.L.R. 46 All. 706.

"a distinction exists between the legal rights of husband and parents on the one side and those of the other near relations on the other. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship ; the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations."

No doubt that was a case that arose under section 19 of the Guardians and Wards Act but the principle upon which it is based is, in our opinion, equally applicable to proceedings under section 491, Criminal Procedure Code.

For these reasons we hold that the petitioner is entitled to the custody of his son Jayaram and we have consequently directed that the respondent should deliver him to the petitioner's custody.

K.S. *Petition allowed.*

[PRIVY COUNCIL.]

(On appeal from the Judicial Commissioners Court, North-West Frontier Province.)

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Sir Mohammad Akbar Khan .. *Appellant**

v.

Musammat Motai and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 41, *rule* 27 (1) (b)—*Admission of further evidence in appeal—Power of Court—Limits—Jurisdiction—Valuation for purposes of—Suit for redemption of a mortgage—Limitation Act* (*IX of* 1908), *section* 20—*Scope of—Time for redemption if extended by.*

The power of an appellate Court to admit further evidence under Order 41, rule 27 (1) (*b*) of the Civil Procedure Code is confined to cases in which the Court requires any document to be produced, or any witness to be examined, to enable him to pronounce judgment or for any other substantial cause. The Court would not be justified in admitting additional evidence where the effect would be to allow the party concerned to fish out evidence in order to prove his case and make up the lacuna in the existing evidence.

The effect of the Court-Fees Act, 1870, section 7, sub-section (9) and section 8 of the Suits Valuation Act, 1887, is that the normal rule that valuation for court-fees and jurisdiction is the same does not apply to (amongst others) redemption suits and there is no statutory provision as to the amount at which a suit for redemption is to be valued for purposes of jurisdiction. The value for purposes of jurisdiction in a redemption suit when the mortgagee is in possession, depends upon the amount found due to the mortgagee and not upon the value of the property concerned. A redemption suit is concerned with the interest of the mortgagee only and not with the interest of the mortgagor, and hence the value of the equity of redemption would be irrelevant for purposes of valuation.

Ma Hla Saing v. *Ma Su We*, (1927) I.L.R. 5 Rang. 499, overruled.

The wording of section 20 of the Limitation Act is clear and applies only to extend the time for recovery of the mortgage debt and no reference is made in the section to the right of redemption. Hence, to extract from it an extension of time for redemption would involve reading into the section something which is not there.

Anwar Husain v. *Lalunar Khan*, (1903) I.L.R. 26 All. 167 ; *Ganpati Mankeshwar* v. *Madhav Shankar*, (1922) I.L.R. 46 Bom. 1000 and *Piroze Khan* v. *Kanhiya Ram*, A.I.R. 1924 Lah. 484, approved.

C. S. Rewcastle and *R. Parikh* for Appellant.

S. P. Khambhatta and *J. H. Umrigar* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave from a judgment and decree of the Court of the Judicial Commissioner, North-West Frontier Province, dated 28th April, 1941, affirming a judgment of the Additional Judge of Peshawar, dated 17th January, 1941, which affirmed the judgment and decree of the Subordinate Judge, 4th Class, Mardan, dated 11th June, 1937. The appeal

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* P. C. Appeal No. 77 of 1944. 29th July, 1947.

arises out of a suit brought by the appellant against the respondents for possession of certain lands by redemption of a mortgage on paying the amount due upon the mortgage which is claimed to be Rs. 8.

The facts giving rise to the appeal, which are not in dispute, are as follows :

The mortgage for the sum of Rs. 8 which the appellant seeks to redeem has not been produced, and there is no evidence that any written mortgage ever existed. The evidence that the respondents are in possession of the lands in suit as mortgagees consists of:

(*a*) An entry in the Jamabandi (Register of owners' holding) for the year 1885-86 of the village of Mardan, in which under the heading "Name of owners with particulars" Burhan-ud-din is mentioned as mortgagor and Fazal Shah is mentioned as mortgagee for Rs. 8 in King-Emperor's coin. The property is stated to be cultivated by the mortgagees themselves.

(*b*) An extract from the record-of-rights relating to the village of Mardan for the year 1895-96 in which Burhan-ud-din is stated to be mortgagor, and Mst. Motai first wife, Mst. Mustafa second wife, Mst. Walagai, third wife, and Mst. Ajjo, fourth wife of Fazal Shah are stated to be mortgagees in equal shares, and to be cultivating themselves.

(*c*) An entry in the Mutation Register for the village of Mardan relating to the years 1925-26, in which Burhan-ud-din is stated to be mortgagor and the said four wives of Fazal Shah are stated to be mortgagees in equal shares.

Mst. Motai, the first wife of the Fazal Shah, is the first respondent. The other respondents claim under Sherdil to whom the three other wives of Fazal Shah transferred their rights.

On the 1st June, 1935, the appellant purchased from the sons of Burhan-ud-din, the original mortgagor, the equity of redemption in the property for the sum of Rs. 25,000.

On the 27th August, 1936, the appellant instituted the present suit in the Court of the Subordinate Judge, Mardan, claiming to redeem the mortgage vested in the respondents on payment of Rs. 8 and praying for a decree for possession of the land. The suit was valued in the plaint for purposes of court-fee and jurisdiction at Rs. 8.

The case was tried by the Subordinate Judge of the 4th Class, Mardan. The learned Judge raised various issues of which the first was :

"Is the plaintiff's suit within time?"

He held that the burden of proving that the suit was within time was on the plaintiff; that inasmuch as under Article 148 of the Limitation Act a suit for redemption must be brought within 60 years from the time when the right to redeem, or to recover possession, accrued, and there was no evidence that the mortgage was for any fixed term, the plaintiff must prove that the mortgage was effected on or after the 27th August, 1876, being 60 years before the date of suit, and this he had failed to do. Accordingly, the suit was dismissed.

In appeal the District Judge of Peshawar admitted in evidence under Order 41, rule 27 (1) (*b*), a further document which he thought might be material, and remanded the case to the lower Court under Order 41, rule 23 for a decision on all the issues.

From the order of the District Judge an appeal was brought to the Court of the Judicial Commissioner, North-West Frontier Province. It was argued for the appellant that the trial Judge had no jurisdiction to hear the case which was beyond the limits of his pecuniary jurisdiction. This argument was rejected. It was then held that an appeal lay from the order of remand made by the District Judge, and that such order was not justified, since no case for admitting further evidence had been shown. Accordingly, the order of the District Judge

was set aside, and the case was sent back to the lower appellate Judge with directions that he should proceed to decide the case on merits.

On the appeal from the Subordinate Judge coming again before the District Judge, it was held that the Subordinate Judge was right in the view he had taken on the issue of limitation, and the appeal was dismissed.

From this judgment there was an appeal to the Court of the Judicial Commissioner. That Court agreed with the views of the Lower Courts on the question of limitation. They also rejected an argument presented to them that there had been an acknowledgment of the mortgage giving a fresh start for limitation under section 19 of the Limitation Act, a point which has not been argued before this Board. In the result the appeal was dismissed, and from that decision this appeal has been brought.

The points argued before the Board were :

First, that the case was beyond the limits of the pecuniary jurisdiction of the trial Judge.

Secondly, that the burden of proving that the suit was within time was wrongly placed on the appellant and, alternatively, that if such burden lay initially on the appellant, the evidence produced was sufficient to shift the burden to the respondents.

Thirdly, that the District Judge at the first hearing before him was right in admitting further evidence and in remanding the case.

Their Lordships can dispose of the third point shortly. The power of an Appellate Court to admit further evidence under Order 41, rule 27 (1) (*b*) is confined to cases in which the Court requires any document to be produced, or any witness to be examined, to enable it to pronounce judgment or for any other substantial cause. As pointed out by this Board in the case of *Parsotim* v. *Lal Mohar*[1], the power only arises where the Court requires the further evidence for one of the two causes specified. The document which the learned District Judge allowed to be given in evidence in this case was a copy of a Mutation from the Settlement Record of 1883-84 of the village of Mardan, and it was suggested that that document would help the case of the appellant. But the document in question was a copy of a public document which the appellant could have put in evidence at the trial. It was certainly not required to enable the learned District Judge to pronounce judgment, nor does there appear to have been any other substantial cause for which the Judge required the document. Their Lordships agree with the view of the Court of the Judicial Commissioner that the effect of the Remand Order was " to allow the plaintiff to fish out evidence in order to prove his case and make up the lacuna which, at the present moment, exists". Their Lordships agree that the Remand Order was not justified.

The question of jurisdiction arises in this way. The trial Judge, as already noted, was a Subordinate Judge of the 4th Class and under Regulation 19 of the North-West Frontier Province Courts Regulation, 1931, his jurisdiction was limited to cases in which the value does not exceed Rs. 1,000. The effect of the Court-Fees Act, 1870, section 7, sub-section (9), and section 8 of the Suits Valuation Act, 1887, is that the normal rule that valuation for court-fees and jurisdiction is the same does not apply to (amongst others) redemption suits and there is no statutory provision as to the amount at which a suit for redemption is to be valued for purposes of jurisdiction. The question which arises is whether, in a redemption suit with the mortgagee in possession, the value should be based upon the value of the property concerned, or upon the value of the interest therein of the mortgagee. Reliance is placed by the appellant on the case of *Ma Hla Saing* v. *Ma Su We*[2], where it was held that in a redemption suit where the mortgagee is in possession the subject-matter is the land sought to be redeemed and the valuation of such

1. (1931) 61 M.L.J. 489 : L.R. 58 I.A. 254 ; I.L.R. 10 Pat. 654 (P.C.).

2. (1927) I.L.R. 5 Rang. 499.

suits for the purposes of jurisdiction should be based on the value of the land. That view has not prevailed in the Indian High Courts where it has been held that value for purposes of jurisdiction in a redemption suit depends on the amount found due to the mortgagee. In their Lordships' opinion this latter view is clearly correct. As pointed out in the judgment of the Court of the Judicial Commissioner a redemption suit is concerned with the interest of the mortgagee only and not with the interest of the mortgagor, and the value of the equity of redemption is irrelevant. It is no doubt true that where the mortgagee is in possession the effect of granting or withholding an Order for redemption, may be, to confirm the title of the mortgagor or the mortgagee, as the case may be, to the whole property, but this is an incidental effect of the Order made, and does not involve that the whole property is the subject-matter of the litigation. In their Lordships' view, therefore, the suit was correctly valued for purposes of jurisdiction at Rs. 8.

That leaves only the question of limitation. Section 3 of the Limitation Act enacts that:

"Subject to the provisions contained in sections 4 to 25 inclusive, every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

In Order 7, of the Civil Procedure Code, rule 1 requires the plaint to contain amongst other particulars the facts constituting the cause of action and when it arose. Rule 6 requires that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint must show the ground upon which exemption from such law is claimed. Rule 11 enacts that the plaint shall be rejected if the suit appears from the statement in the plaint to be barred by any law. It is clear from these provisions that the burden rests in the first instance upon a plaintiff to show that his suit was not instituted after the period prescribed therefor by the first schedule and accordingly is not required to be dismissed under section 3. The appellant, therefore, has to show, as the learned Subordinate Judge held, that the mortgage on which his title is based was made on or after the 27th August, 1876. All that he does show is that the mortgage was in existence in the year 1885. The appellant has argued that this is sufficient to shift to the respondents the burden of showing that the suit was not within time. No doubt, in some cases, the evidence may reach a point at which the onus of proving a suit to be out of time rests upon the defendant, and regard must always be had to the party in whose knowledge the relevant facts may appear to be. But their Lordships agree with the Courts in India in thinking that the fact that a mortgage existed in 1885 affords no ground for presuming that it arose in or after 1876 ; nor does there appear to be any reason in this case for thinking that the mortgagees are withholding relevant information. The mortgagors admittedly left in possession of a valuable estate for over 50 years parties claiming under a mortgage for a nominal amount and no explanation of this conduct is forthcoming. If there is a difficulty now in proving the origin of the mortgage, that is due to the long delay by the mortgagors in attempting to enforce their claim.

It was argued before this Board, though not before the Courts in India, that the time for redemption had been extended by the operation of section 20 of the Limitation Act. Section 20 (1) provides :

"Where interest on a debt or legacy is before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made."

Sub-section (2) provides :

"Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1)."

The section, in terms, refers to the payment of interest on a debt or legacy and makes receipt of the rent or produce of the land by a mortgagee in possession

equivalent to a payment of interest and a fresh period of limitation has to be computed from the time when the payment was made. This must clearly mean a fresh period of limitation for payment of the debt or legacy, and no reference is made in the section to the right of redemption. The argument, however, is that the mortgage contract is one, that the rights of mortgagor and mortgagee are reciprocal and correlative, and that the Legislature in extending the time within which the mortgagee may sue for his debt must have intended at the same time to extend the period in which the mortgagor can redeem the property, since it would be anomalous to leave the right of the mortgagee to recover his debt alive, after his obligation to be redeemed is dead. Mr. Khambatta for the respondents has referred the Board to three decisions in India, namely, *Anwar Husain* v. *Lalmir Khan*[1], *Bhagwan Ganpati Mankeshwar* v. *Madhav Shankar*[2] and *Piroz Khan* v. *Kanhiya Ram*[3], in which this argument was rejected, and it was held that section 20 applied only to extend the time for recovery of the mortgage debt. In their Lordships' opinion these cases were rightly decided. The wording of section 20 is clear and to extract from it an extension of the time for redemption would involve reading into the section something which is not there, and this could only be justified if it appeared to be necessary in order to give effect to the intention of the Legislature to be ascertained from the Act as a whole. The construction suggested would involve that there was in effect no time limit for the redemption of a usufructuary mortgage, and this is not an intention which can be readily imputed to the Legislature. Their Lordships are not impressed with the suggested anomaly arising from the construction which they place upon the section. In the unlikely event of a mortgagee suing to recover his money after the right of redemption has become barred it can hardly be supposed that he would be successful without being required to perform the condition inherent in every mortgage contract that the security will be returned when the money is paid.

For these reasons, which are substantially those which appealed to the Court of the Judicial Commissioner, their Lordships think that this appeal fails and they will humbly advise His Majesty accordingly. The Appellant must pay the costs of the respondents.

Solicitors for Appellant : *Stanley Johnson and Allen.*

Solicitors for Respondents : *T. L. Wilson & Co.*

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD THANKERTON, LORD DU PARCQ AND SIR MADHAVAN NAIR.

Province of Bombay .. *Appellant**

v.

Hormusji Manekji .. *Respondent.*

Land revenue—Bombay Revenue Jurisdiction Act (X of 1876), section 4 (b)—Scope—Exclusion of Civil Court's jurisdiction—Limits—Order of Governor in Council in effect cancelling agreements by collector giving lands at concession assessment and ordering recovery at full standard rates—Validity—Suit for declaration that full assessment was not recoverable and for refund of excess amounts collected—If one based on "objection to amount or incidence of assessment"—Bombay Land Revenue Code (V of 1879), sections 67 and 211—Scope.

It is a familiar principle of statutory construction that where you find in the same section express exceptions from the operative part of the section, it may be assumed, unless it otherwise appears from the language employed, that these exceptions were necessary, as otherwise the subject-matter of the exceptions would have come within the operative provisions of the section. There are four exceptions in the proviso to section 4 of the Bombay Revenue Jurisdiction Act which are clearly general

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1. (1903) I.L.R. 26 All. 167.
2. (1922) I.L.R. 46 Bom. 1000.
3. A.I.R. 1924 Lah. 484.

* P. C. Appeal No. 102 of 1945. 12th June, 1947.

exceptions to the operative provisions of the section. A suit for declaration that an order of the Governor in Council that standard non-agricultural assessment at the full rate should be levied on an entire holding held under concession rates on account of erection of structures on a prohibited portion of the holding is one based on an " objection to the amount or incidence of assessments authorised by the Government " within the meaning of section 4 (*b*) of the Bombay Revenue Jurisdiction Act and the jurisdiction of the civil Court was accordingly excluded.

The civil Courts have jurisdiction to determine a question as to excess of the statutory powers conferred by the Bombay Land Revenue Code, for example where the Governor in Council in effect cancels by his order agreements entered into by the Collector granting lands for agricultural purposes.

Limits of the Governor's power under section 211 of the Bombay Land Revenue Code considered and the order in question found to be *intra vires*.

Sir Cyril Radcliffe, K.C., Pringle, K.C. and Khambatta, K.C. for the Appellant.

Sir Thomas Strangman, K.C. and Jayakar for the Respondent.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Bombay (N. J. Wadia and Sen, JJ.), dated the 8th August, 1940, in a Letters Patent Appeal, confirming a judgment and decree of a single Judge of that Court, Wassoodew, J., dated the 11th April, 1938, in the exercise of appellate jurisdiction, whereby a decree of the District Judge, Ahmedabad, dated the 8th October, 1934, was set aside, and the respondent's suit was, for the main part, decreed. The decree of the District Judge had confirmed a decree of the First Class Sub-Judge of Ahmedabad, dated the 24th October, 1933, under which the respondent's suit was dismissed.

On the 13th October, 1931, the respondent brought the present suit against the appellant praying for a declaration that the appellant was not entitled to recover from the respondent any assessment of certain land, of which the respondent was registered occupant, in excess of the amounts payable by him under agreements dated respectively the 25th July, 1906, the 13th February, 1915, and 21st December, 1924, for repayment of Rs. 606-7-0 illegally levied from him in the years 1928 to 1931 inclusive, and for other relief.

The Subordinate Judge and the District Judge held that the suit was barred under section 4 (*b*) of the Bombay Revenue Jurisdiction Act (Act X of 1876), and that the three agreements were cancelled by an order of the Governor in Council dated the 11th April, 1930, levying assessment at the full standard rate on the entire holding of the respondent as from 1927-28, and that the Governor in Council was competent to pass such an order under section 211 of the Bombay Land Revenue Code, 1879, (Bombay Act V of 1879), hereinafter referred to as " the Code."

The High Court on second appeal and on the Letters Patent Appeal reversed the decision of the lower Courts on both points of law, and held that the 1924 agreement was unenforceable and duly cancelled by the appellant, but held that the 1915 agreement was still enforceable as regards buildings erected before 1920, that the full standard rate should not be applied to such buildings, and that the appellant should refund to the respondent any altered assessment or penalty levied in excess of that stipulated in the agreement of 1915 in respect to buildings as they existed in 1920, the excess sum, if any, to be determined in execution.

The respondent is the owner and registered occupant of a plot of land measuring 7,744 square yards, being Survey No. 149 of Mouje Changsipur in the North Daskroi taluk of the Ahmedabad Collectorate within the Ahmedabad Municipality. The plot had been used for agricultural purposes only up to 1904, in which year he erected an ice factory on part of it. He had applied to the Collector under section 65 of the Code for permission to use the land for such a non-agricultural purpose, and permission was granted under section 67 on terms which were subsequently embodied in a formal agreement dated the 25th July, 1906. For reasons, that their Lordships will shortly explain, this agreement was superseded, and need not be further examined.

In 1915, the respondent acquired Survey No. 150-A lying immediately to the north of Survey No. 149, for the purpose of extending his ice factory. He applied to the Collector for amalgamation of the two Survey Nos. and for permission to appropriate the amalgamated holding to non-agricultural purposes in accordance with a plan which showed the buildings as proposed to be extended. A formal agreement embodying the permission and its conditions was executed between the Government through the Collector and the respondent on the 13th February, 1915, the material provisions of which are as follows :

" Now it is hereby agreed between the Secretary of State and the applicant that permission to appropriate to non-agricultural purposes the plot of land indicated by the letters A B C D on the said site plan (which plot of land is hereinafter referred to as ' the said plot of land ') in the particular manner shewn in the said site plan, namely :—

(a) an area of 2,161 sq. yards indicated by a red colour and the letters EFGHIJKLMNO for the purpose of a pagi room, bungalow, godown, factory, boiler house, smithy, tank and quarters.

(b) an area of 56 sq. yards indicated by a yellow colour and the letters HPQ for the purpose of a stable and latrines.

(c) an area of 9,883 sq. yards indicated by the uncoloured portion of the said plot for the purpose of an open compound only,

and is hereby granted subject to the provisions of the said Code, and Rules and Orders thereunder, and on the following special terms and conditions, namely :—

1. The applicant in lieu of the present assessment leviable in respect of land shall pay to Government without deduction on the first day of January, in each and every year an annual assessment of Rs. 27 only during the fifty years commencing on the first day of August, 1903, and ending on the 31st day of July, 1953, and thereafter such revised assessment as may from time to time be fixed by the Collector under the said Code and Rules and Orders thereunder :

* * * * * * *

3. The applicant is hereby prohibited under the last paragraph of section 48 of the said Code from appropriating, without the previous permission in writing of the Collector, any part of the said plot of land to any purpose other than that for which permission to appropriate it is hereinbefore granted to the applicant :

Provided that :—

(i) nothing in the above shall be deemed to prohibit the applicant—

(a) from erecting or constructing, without such previous permission, in the portion (c) (*i.e.*, appropriated for the purpose of an open compound only) boundary walls not exceeding four feet in height, garden-fountains, uncovered steps and similar structures, not being projections from a building such as verandahs, balconies, eaves or shop-boards ;

(b) from constructing without such previous permission, wells or tanks in any part of such portion (c) that does not lie within a margin consisting of a strip 21 feet broad on the west and 10 feet on the other sides and inside the perimeter of the said plot of land except as otherwise shown on the plan ;

(c) from appropriating, without such previous permission, to any non-agricultural purpose, other than that of a shop, a stable or a privy, to an extent not exceeding in total admeasurement 364 sq. yards, any part of such portion (c) that does not lie within the aforesaid margin ; and

(ii) Where any such prohibited appropriation is permitted by the Collector, the applicant shall except in the case of an appropriation of any part of the land measuring 364 sq. yards and specified in sub-clause (c) proviso (i) above, be liable to pay from the date of the appropriation in respect of the land so appropriated such enhanced assessment not exceeding Rs. 3-9-10 per hundred sq. yards as the Collector may deem fit to impose, and in any case the total amount payable under clause 1 of this agreement shall be modified accordingly."

It may be added that, under clause 5 of the agreement, the applicant undertook to erect and complete the buildings shewn in the plan within three years from the date of the agreement, and that, under clause 8, the Collector might, without prejudice to any other penalty to which the applicant might be liable under the provisions of the Code or rules or orders thereunder, direct the removal or alteration of any building or structure erected contrary to clause 3 or 5 of the agreement.

On the 21st September, 1920, the respondent submitted to the Collector a plan shewing the pulling down of a portion of the factory on the northern side and an extension, and asked that permission should be granted. On the 23rd October, 1920, the plan was returned duly approved and it was stated that the former agree-

ment and plans were regarded as cancelled. A fresh agreement appears to have been prepared, but it does not appear to have been executed.

In 1921, new rules were made under section 214 of the Code, and Rule 87 (*b*) thereof prescribed that on the assessment of land used for non-agricultural purposes a sanad should be granted in form M attached to the Rules. This superseded form A, which had been used in the agreements of 1906 and 1915.

On the 12th November, 1922, the respondent applied for permission further to extend the factory, and a plan shewing the proposed construction work was submitted with the application. After correspondence, the Collector on the 27th July, 1923, granted permission and approved the plan, and stated that he would be given a sanad in form M. The respondent demurred to this, and asked for form A, to which the Collector agreed on the 9th June, 1924. Thereafter an agreement was executed on the 21st December, 1924, in form A, in similar terms to the 1915 agreement, except that the proviso (*i*) (c) of clause 3 was struck out. Their Lordships do not trouble with this agreement, for both the appellant and the respondent accepted the finding of the High Court that it was unenforceable, as the Collector had no authority to act as agent of the Government in becoming a party to an agreement in the old form A.

On receipt of a circle-inspector's report that the respondent had been building on land not covered by the permission given to him and in a manner contrary thereto, as shewn in a plan attached to the report, the Collector, on the 23rd June, 1926, called upon the respondent for his explanation, which he submitted on the 6th December, 1926. On the 1st February, 1927, the Collector ordered the respondent to pay a penalty in respect of unauthorised erections on 269 square yards and to pay an altered assessment at half the standard rate on 118 yards and on 151 square yards at the full standard rate and gave other directions.

The respondent appealed to the Commissioner, who, by order dated the 30th April, 1927, rejected the appeal, and made a further order, namely, (*i*) execution of the agreement in form A in 1924 after the Land Revenue Rules 1921 came into force was irregular, (*ii*) the agreement was broken, (*iii*) non-agricultural assessment was charged at reduced rates and concessions were allowed in respect of compound area though land was used for commercial purposes, that is, ice factory. Reference was made to Government Resolution No. 6694 of 1924, dated 5th October, 1926, and the Collector was requested to issue orders for the levy of non-agricultural assessment at full rates and an issue of Sanad in form M was directed.

On the 12th May, 1928, the Collector informed the respondent that, under instructions from the Commissioner, his order dated the 9th June, 1924, was superseded by the following order :

(1) The agreement in form A of 1924 is broken. It is therefore cancelled and a new sanad in form M is ordered to be taken.

(2) The buildings in these Survey Nos. are used for commercial purposes. Altered assessment of Rs. 171-8-0 at full standard rate is therefore ordered to be levied from the year 1927-28.

(3) The occupant should submit fresh plans called for in this office No. L.N.D., 631, dated 1st February, 1927.

On the 23rd July, 1928, the respondent appealed to the Commissioner, who rejected the appeal on the 5th December, 1928. On the 28th July, 1929, the respondent appealed to the Government. On the 11th April, 1930, the Governor in Council passed the following Order, in the form of a resolution :

"*Resolution.*—Government are advised that the procedure followed by the Commissioner in rejecting the petitioner's appeal and thus confirming the Collector's order, but at the same time directing the Collector to revise his own order and to issue a fresh order according to his instructions was improper. These proceedings are hereby cancelled, and Government are pleased to direct that non-agricultural assessment at the full standard rate shall be levied on the entire holding of the

petitioner with effect from the year 1927-28 and that a sanad in form M appended to the Land Revenue Rules 1921 shall be issued.

The petitioner should be referred to the Commissioner, N.D., for a reply to his petition."

On the 28th October, 1930, the Collector informed the respondent of the purport of the said order, and requested him to submit plans shewing the existing buildings to enable the Collector to grant him a sanad in form M. In terms of the said order rates to the amount of Rs. 702-7-0 were recovered from the respondent. On the 13th October, 1931, the respondent brought the present suit, asking for the declaration already referred to, and repayment of Rs. 606-7-0 as illegally levied from him.

The appellant, in the first place, maintains that the jurisdiction of the Civil Courts over the subject matter of this suit is excluded by section 4 (*b*) of the Bombay Revenue Jurisdiction Act, 1876, which, so far as material provides as follows :

"4. Subject to the exceptions hereinafter appearing,

no civil Court shall exercise jurisdiction as to any of the following matters :

* * * * * * *

(*b*) objections—

to the amount or incidence of any assessment of land revenue authorised by the Provincial Government, or to the mode of assessment, or to the principle on which such assessment is fixed, or

to the validity or effect of the notification of survey or settlement or of any notification determining the period of settlement ;

* * * * * * *

Provided that, if any person claim to hold wholly or partially exempt from payment of land-revenue under—

(*h*) any enactment for the time being in force expressly creating an exemption not before existing in favour of an individual or of any class of persons, or expressly confirming such an exemption on the ground of its being shewn in a public record, or of its having existed for a specified term of years, or

(*i*) an instrument or sanad given by or by the order of the Governor of Bombay in Council under Bombay Act No. II of 1863, section 1, clause first, or Bombay Act No. VII of 1863, section 2, clause first, or

(*j*) any other written grant by the British Government expressly creating or confirming such exemption, or

(*k*) a judgment by a Court of law, or an adjudication duly passed by a competent officer under Bombay Regulation XVII of 1827, Chapter X or under Act No. XI of 1852, which declares the particular property in dispute to be exempt,

such claim shall be cognizable in the civil Courts."

The appellant maintains that the subject matter of the present suit is an objection to the amount, incidence or mode of assessment of land revenue, within the meaning of section 4 (*b*) but Sir Cyril Radcliffe, on behalf of the appellant rightly conceded that the Civil Courts have jurisdiction to determine a question as to excess of the statutory powers conferred by the Code. In the opinion of their Lordships, such a question is raised in the present case, in so far as the respondent maintains that, in so far as the order of the Governor in Council of the 11th April, 1930, may be held to cancel any of the agreements of 1906, 1915 or 1924, it was not within the powers conferred by section 211 of the Code under which the appellant sought to justify it. This aspect of the case does not appear to have been separately considered by any of the Courts below, but in the opinion of their Lordships, it should logically be first considered. Section 211 of the Code so far as material, provides as follows :

"211. The Governor in Council and any revenue officer, not inferior in rank to an Assistant or Deputy Collector or a Superintendent of Survey in their respective departments, may call for and examine the record of any inquiry or the proceedings of any subordinate revenue officer, for the purpose of satisfying himself as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer.

* * * * * *

If, in any case, it shall appear to the Governor in Council or to such officer aforesaid, that any decision or order or proceedings so called for should be modified, annulled, or reversed, he may pass such order thereon as he deems fit."

In order to appreciate the true nature of the agreements founded on by the respondent, it will be convenient to refer to certain sections of the Code (as amended down to 1913), namely, sections 48, 65, 66, and 67, the material provisions of which are as follows :

"48. (1) The land revenue leviable on any land under the provisions of this Act shall be assessed, or shall be deemed to have been assessed, as the case may be, with reference to the use of the land—

(a) for the purpose of agriculture,

(b) for the purpose of building, and

(c) for a purpose other than agriculture or building.

(2) Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provisions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the Governor in Council may prescribe.

(3) Where land held free of assessment on condition of being used for any purpose is used at any time for any other purpose, it shall be liable to assessment.

* * * * * *

65. An occupant of land assessed or held for the purpose of agriculture is entitled by himself, his servants, tenants, agents, or other legal representatives, to erect farm buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land, or its more convenient use for the purpose aforesaid.

But, if any occupant wishes to use his holding or any part thereof for any other purpose the Collector's permission shall in the first place be applied for by the occupant.

The Collector, on receipt of such application,

(a) shall send to the applicant a written acknowledgment of its receipt, and

(b) may, after due enquiry, either grant or refuse the permission applied for :

Provided that, where the Collector fails to inform the applicant of his decision on the application within a period of three months, the permission applied for shall be deemed to have been granted ; such period shall if the Collector sends a written acknowledgment within seven days from the date of the receipt of the application, be reckoned from the date of the acknowledgment, but in any other case it shall be reckoned from the date of receipt of the application.

Unless the Collector shall in particular instances otherwise direct, no such application shall be recognised except it be made by the occupant.

When any such land is thus permitted to be used for any purpose unconnected with agriculture it shall be lawful for the Collector, subject to the general orders of Government, to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of section 48.

66. If any such land be so used without the permission of the Collector being first obtained, or before the expiry of the period prescribed by section 65, the occupant and any tenant, or other person holding under or through him shall be liable to be summarily evicted by the Collector from the land so used and from the entire field or survey number of which it may form a part and the occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of section 48 for the period during which the said land has been so used, such fine as the Collector may, subject to the general orders of Government, direct.

* * * * * *

67. Nothing in the last two preceding sections shall prevent the granting of the permission aforesaid on such terms or conditions as may be prescribed by the Collector, subject to any rules made in this behalf by the Governor in Council."

The agreement of 1924, being admittedly out of the case, their Lordships will confine their attention to the agreements of 1906 and 1915. In both cases the respondent required to apply under section 65 for permission to use agricultural land for a non-agricultural purpose, as in 1915 the respondent had acquired the adjoining Survey number. The permission in both cases was given under section 67, the terms or conditions being embodied in an agreement, the subject of assessment being strictly defined by a plan shewing the authorised buildings and the area assessed, and the assessment being one sum in respect of the unit of assessment in the condition as regards buildings prescribed by the contract. There was a limited power, where previously permitted by the Collector, to appropriate for any purpose other than that for which permission was granted by the agreement, and for an enhanced assessment not exceeding a prescribed rate per hundred square yards, the total amount of the assessment being modified accordingly. Admittedly, the Collector had a complete discretion as to the granting of any such further permission.

The 1906 agreement was clearly superseded by the 1915 agreement, for not only did it deal with a subject of assessment which had been altered as regards the authorised buildings, but the new subject of assessment—again in one sum—included part of survery No. 150-A, the two areas being amalgamated. In other words the previous unit of assessment under the 1906 agreement no longer existed. It remains to deal with the agreement of 1915, and it is crucial to consider the effect of the respondent's unauthorised building as shown on the plan which accompanied the circle-inspector's reports in June, 1926, and in the plan Exhibit 80, dated in 1929, and the respondent's evidence. Their Lordships are bound to accept the statement of the District Judge that

> " the plaintiff himself admitted that he has put up structures on prohibited portions and has put structures in contravention of the agreements of 1906 and 1915."

Wassoodew, J., in the High Court, made the following decree :

> " For the reasons stated in the accompanying judgment, the Court grants a declaration to the plaintiff as prayed for in paragraph 2 (A) of the plaint, *viz*, that the Secretary of State is entitled to levy from him only non-agricutural assessment under the agreement of 13th February, 1915, on the land built upon out of survey Nos. 149 and 150-A of Mouje Changispur *alias* Mithakhali in pursuance of that agreement. The Court grants an injunction that the full standard rate shall not be applied to the buildings erected by the plaintiff before 1920 under the terms of the agreement of 1915, and directs that Government shall refund to the plaintiff any sum either by way of altered assessment or penalty levied in excess of that stipulated in the agreement in respect to the buildings as they existed in 1920. The excess sum if any shall be determined in execution. As to buildings erected after 1920 the plaintiff is not entitled to any declaration, Government being entitled to levy such altered assessment as may be leviable in accordance with law."

That decree was confirmed in the Letters Patent appeal. Their Lordships feel bound to express their difficulty in appreciating how such a decree can be reconciled with the established facts of the case, apart from the question whether it correctly states the legal position.

The agreement of 1924, and the permission thereby granted, being out of the case, it is correct to say that no permissions for alterations or extensions have been granted since those granted prior to 1920. The plan annexed to the 1915 agreement has not been forthcoming, but the plan submitted by the respondent with his application on the 21st September, 1920, for permission for alterations on the factory shows the 1915 plan with the proposed alterations in red. It is exhibit 20. A comparison of this plan with (1) Exhibit 23, being the plan submitted by the respondent which was annexed to the abortive agreement of 1924, and (2) Exhibit 80, a plan dated the 22nd October, 1929, which the respondent accepted in his evidence on the 27th September, 1933, as showing the then state of the building, demonstrates beyond all question the very material changes that have been made by the respondent by demolition, reconstruction and extension on the unit of assessment which was the subject matter of the 1915 agreement. This is more than confirmed by the statement by the respondent, under cross-examination, as to his operations as shown by a comparison of Exhibit 23 and Exhibit 80. In short, it is impossible now to identify the buildings erected under the agreement of 1915.

Further, their Lordships are unable to agree that the agreement of 1915, can survive the alterations which the respondent himself has made, and which are such that, in the opinion of their Lordships, he has so altered the subject of assessment that the agreement of 1915 is not capable of being applied to it. Their Lordships can find no justification under the Code for splitting up the assessment which is on the land into two parts, applying to the same land, each part being calculated according to a different mode of assessment. Their Lordships are of opinion that the respondent, by his unauthorised alterations and extensions in 1920, and subsequent years has so altered the subject matter of the 1915 agreement that it has become useless and unenforeable.

Having formed this view, their Lordships are clearly of opinion that the order, or resolution of the Governor in Council dated the 11th April, 1930, even if it impliedly treated the agreements as broken or cancelled, did no more than recognise the true position of the agreements in law, and was not *ultra vires* of the Governor

in Council, acting under section 211 of the Code. That question having been thus resolved, it is then necessary to consider whether the jurisdiction of the Civil Court as to any further question on the merits is excluded by section 4 (*b*) of the Bombay Revenue Jurisdiction Act, 1876. On this point Wassoodew, J., says :

> " On the principal question it seems to me that section 4 (*b*) of the Revenue Jurisdiction Act (X of 1876) cannot operate as a bar to these proceedings. In effect the plaintiff has sought for a declaration that certain agreements between the parties as to the levy of assessment on his land were binding upon Government. He did not directly question the legality of the orders of Government on any other ground or their power to levy full standard rates upon conversion of agricultural holding if the agreements did not operate as a bar. In terms he is asserting a right independently of the question of the legality of Government's right to recover altered assessment. Now such a suit could not be described as a suit objecting to the amount or incidence of any assessment of land revenue authorised by Government, or to the mode of assessment, or to the principle on which such assessment is fixed, within the meaning of clause (*b*) of section 4."

The learned Judge relied on two cases, *Lakshman* v. *Govind*[1] and *Damodar Mahadev Bhonde* v. *Kashinath Sadashiv*[2]. In the Letters Patent Appeal, Sen, J., in whose judgment N. J. Wadia, J., concurred, quotes a passage from the judgment of Chandavarkar, J., in *Lakshman's case*[1] as follows :

> " In one sense, no doubt, whenever an inamdar sues an occupancy tenant to recover land revenue according to the survey rates and the tenant resists the claim on the ground that he has acquired a right as against the inamdar to pay rent or revenue at a permanently fixed rate, he may be said to object to the amount or incidence of land revenue authorised by Government. But it is an objection which does not hit the amount of incidence directly; that is its indirect effect, which is not what the first head of clause (*b*) having regard to its language, was intended to strike at. The objection must be ' to the amount or incidence of any assessment of land revenue ' itself and as such."

Sen, J., the proceeds,

> " And his Lordship held in that case that an objection to come within the heads of clause (*b*) of section 4 must be an objection which reached them directly, *i.e.*, an objection to them *per se* which admitted the liability to pay land revenue on the part of the objector but quarrelled with its amount or incidence or the validity and effect of the notification of survey settlement as *by themselves* objectionable, not because some other right affected them or made them inapplicable to the particular case. This reasoning was followed by Shah, Acting C.J., in his judgment in *Damodar* v. *Kashinath*[3]. Both the cases might have come more appropriately under section 5 of the Bombay Revenue Jurisdiction Act rather than under section 4. But section 5 is really an exception or a proviso to the provisions of section 4."

The learned Judge was unable to distinguish the facts in the present case from those in *Lakshman's case*[1] and held that the reasoning adopted in *Lakshman's case*[1] applied to the present case, which therefore was not a suit of any of the descriptions to be found in section 4 (*b*) of the Bombay Revenue Jurisdiction Act.

The legal position of the agreements having been determined by their Lordships in relation to the question of *ultra vires* in a way which deprives the respondent of any reliance on them, the whole basis of the respondent's suit has gone, but their Lordships feel bound to dissociate themselves from the narrow construction of section 4 (*b*) of the Bombay Revenue Jurisdiction Act of 1876 which has been adopted by the High Court in the present case, and expressed in the two cases referred to.

It is a familiar principle of statutory construction that where you find in the same section express exceptions from the operative part of the section, it may be assumed, unless it otherwise appears from the language employed, that these exceptions were necessary, as otherwise the subject-matter of the exceptions would have come within the operative provisions of the section. There are four exceptions in the proviso to section 4, which are clearly general exceptions to the operative provisions of the section. If the construction adopted by Chandavarkar, J., in *Lakshman's case*[1] and adopted by the High Court in the present case be correct, these exceptions were unnecessary, and they are stronger instances for the application of that construction, for the respondent's agreements are contracts fixing the amount of land revenue to be paid ; they are neither matters of title to, nor matters of tenure of, the land. Neither the present respondent, nor the defendants in the two inam cases, claimed to come within the proviso to section 4, but section 5

1. (1903) I.L.R. 28 Bom. 74.
2. A.I.R. 1923 Bom. 79.
3. (1922) 24 Bom.L.R. 1040.

was held applicable in the Inam cases, and their Lordships express no opinion as to section 5. Their Lordships are of opinion that, apart from the question of *ultra vires*, the respondent's claim, as set out in the plaint, based on the agreements, did constitute objections to the amount or incidence of assessments authorised by Government within the meaning of section 4 (*b*) of the Bombay Revenue Jurisdiction Act, 1876, and that the jurisdiction of the Civil Court was thereby excluded.

Their Lordships will, accordingly, humbly advise His Majesty that the appeal should be allowed, that the judgments and decrees appealed from should be set aside, and that the suit should be dismissed. In accordance with the undertaking given, the appellant will pay the respondent's costs of this appeal. The respondent will pay the appellant's costs in all the Courts in India.

Solicitor for Appellant : *Solicitor, India Office.*

Solicitors for Respondent : *Cassavetti Coutas & Co.*

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Crown Prosecutor .. *Appellant**

v.

R. K. Pillai and another .. *Respondents.*

Indian Penal Code (XLV of 1860), *sections* 161 *and* 114—*Payment to public officers intended as a donation to a public institution in which they were interested —Connection between the payment and performance of the official duty not established—No offence committed—Defence of India Rules, rule* 34 (6) (*c*).

Certain monies were offered to two officers in the Provincial Textile Commissioner's office by the accused who were the applicants for a permit. It was established by the attendant circumstances that the payment was made as a donation to a public institution in which the officers were interested and that the amounts were offered independently of the result of the application.

Held : (*i*) that as the *sine qua non* was the establishment of a connection between the payment and the performance of the official duty before it can be said that gratification offered was a motive or reward for the purposes mentioned in section 161 of the Code no offence had been made out ;

(*ii*) for the same reasons there was no inducement offered to the officers to fail in the performance of their duties and consequently no "prejudicial act" had been committed by the accused within the meaning of rule 34 (6) (*c*) of the Defence of India Rules.

Case-law discussed.

Appeals under section 417, Criminal Procedure Code, against the orders of acquittal of the aforesaid respondents (accused) by the Chief Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras, in C.C. Nos. 3397 and 3398 of 1945 respectively.

The Advocate-General (*K. Rajah Iyer*) for Crown.

V. L. Ethiraj, V. Rajagopalachari, A. S. Sivakaminathan, A. Krishnaswami and *S. Venkatachalam* for Accused.

The Court delivered the following

JUDGMENT.—These are appeals by the Crown Prosecutor under section 417, Criminal Procedure Code, from the orders of acquittal passed by the Chief Presidency Magistrate in C. C. Nos. 3397 and 3398 of 1945. In the former case two persons, R. K. Pillai and Jayaram Naidu, were charged with having committed offences under section 161 read with section 114, Indian Penal Code and under rule 38 (5) read with rule 34 (6) (*c*) of the Defence of India Rules and in the latter case, one of these two persons, *viz.*, Jayaram Naidu was charged under the same two provisions. They were acquitted in both the cases in respect of both the counts.

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*Cr. App. Nos. 614 and 615 of 1946. 3rd March, 1947.

Although the two cases were tried separately, there is a good deal of common ground between the two and a considerable amount of evidence is also common involving common contentions of fact and of law. It will therefore be convenient to set out generally the facts of the case and the material features and contentions before examining the correctness or otherwise of the Orders of acquittal in each of these cases.

Jayaram Naidu is a tax collector in the service of the Madras Corporation while R. K. Pillai is employed in the Oriental Lungi Company, which is a company engaged in textile business. Mr. Satyamurthi, who during the relevant period was Personal Assistant to the Provincial Textile Commissioner, Madras was, before he was drafted into that department, an accountant in the office of the Corporation of Madras. Prior to that he was cashier and in that capacity had known Jayaram Naidu. The prosecution case is that on the 27th November, 1945, Jayaram Naidu presented an application on behalf of the Oriental Lungi Company signed by R. K. Pillai to Mr. Satyamurthi in the Textile Commissioner's office. The application was for a special permit to export 18,000 yards of handloom cloth to Calcutta. Jayaram Naidu was then said to have represented to Mr. Satyamurthi that R. K. Pillai was his brother and that as such he was interested in the matter. The application was immediately date-stamped by Mr. Satyamurthi himself and endorsed for report to the Textile Control Officer. Mr. Satyamurthi was admittedly empowered under a standing office order of the Provincial Textile Commissioner, *inter alia*, to issue permits for the export of cloth "with reference to settled policy or special instructions." On the 28th November, 1945, Jayaram Naidu is said to have gone to the house of Mr. Satyamurthi in the morning. Mr. Satyamurthi was then conversing with Mr. Sharma, a friend of his. On seeing Jayaram Naidu at his house, Mr. Satyamurthi told him that he was not in the habit of meeting people who had official business with him at his house and asked Jayaram Naidu to leave the house. Jayaram Naidu is said to have immediately left the place only to turn up again the next morning and this time he was not 'chased away' as on the previous day. He met Mr. Satyamurthi on the 29th November at about 8 a.m. at his house and delivered to him an open cover which was received by Mr. Satyamurthi. Just at that moment, the sound of the horn of a car was heard outside and Mr. Satyamurthi recollecting that Mr. Narasimhan, Deputy Secretary to Government had made an appointment with him to discuss about a house required by a relation of his, went out to meet him. As Mr. Narasimhan had parked his car too close to his house, Mr. Satyamurthi asked him to move the car away by a few yards. Mr. Narasimhan complied and then Mr. Satyamurthi placed into the hands of Mr. Narasimhan the cover which he had just then received from Jayaram Naidu and asked Mr. Narasimhan to open the cover and see what it contained saying that the cover had been given to him by a visitor just then. Mr. Narasimhan complied and opened the cover and found in it ten currency notes of Rs. 100 each, wrapped in a letter head of Oriental Lungi Company. Mr. Satyamurthi then told Mr. Narasimhan that the visitor had offered the money to him as illegal gratification and asked Mr. Narasimhan to initial the cover. Mr. Narasimhan again complied and gave back the cover after placing his initials on the cover and not on the currency notes. After advising Mr. Satyamurthi to bring the matter to the notice of the Provincial Textile Commissioner, he left the place in his car without endeavouring to see or interview the person who had given the bribe and without discussing the matter of the house about which he had come to meet Mr. Satyamurthi. Mr. Narasimhan evidently took no further interest in the matter.

Mr. Satyamurthi went to his office at about 11 a.m. and met the Joint Textile Commissioner, Mr. Raghavachari in his room and related to him all that transpired at his house. No statement was taken from Mr. Satyamurthi by Mr. Raghavachari then but Mr. Raghavachari advised Mr. Satyamurthi to send the person, if he turned up, to his room and also asked for the file. This was at about 11 a.m. Soon after, Jayaram Naidu accompanied by R. K. Pillai came to the Textile Commissioner's office and met Mr. Satyamurthi and asked him if the permit had been

granted to which Mr. Satyamurthi replied that the application was before the Joint Textile Commissioner and they could just as well go and see him. He was then asked whether they could offer some money to Mr. Raghavachari to which Mr. Satyamurthi replied that they could do as they liked. They immediately went out of the office and came back a short while later, met Mr. Satyamurthi again and asked him to take them to the Joint Textile Commissioner. Mr. Satyamurthi took them to Mr. Raghavachari's room and introduced them as the persons who had asked for the permit and leaving them in that room returned forthwith to his table. This was at about 12-30 p.m.

Mr. Raghavachari questioned them what they wanted and they said that they wanted a monthly quota for export. As under the rules they were not entitled to it, not having carried on any export business during the prescribed basic period, Mr. Raghavachari told them that they were not entitled to a monthly quota. Immediately thereupon, Jayaram Naidu took out a cover and passed it on to R. K. Pillai who in turn handed it over to Mr. Raghavachari. Just at that moment the Superintendent of the office, Dandayuthapani dropped into Mr. Raghavachari's room and the accused left. Dandayuthapani was asked to open the cover which was closed and on examining the contents he found five hundred rupee notes in it. As the Superintendent was counting the notes, R. K. Pillai again came into the room and asked when he would get the permit. Mr. Raghavachari on that occasion told him that orders would be passed later, on his application. R. K. Pillai then left the room and Mr. Raghavachari made a note of the contents of the cover on its exterior and admittedly no further action was taken until after 2 p.m. when Mr. Satyamurthi met Mr. Raghavachari who related to him all that took place in his room. A written complaint was then taken from Mr. Satyamurthi and was sent along with another report from Mr. Raghavachari to the Deputy Commissioner of Police, Crime Branch, enclosing with it the two covers handed over respectively to Mr. Satyamurthi at his house and to Mr. Raghavachari in his office room with their contents. The accused were coming to the office frequently and enquiring when the permit would be handed over until in the afternoon of the 30th November, 1945, the Inspector, Crime Branch, arrested them in the Textile Commissioner's office. On a search of their persons, among other things which are not relevant to this case, a piece of green paper was found in the pocket of R. K. Pillai. The sixth paragraph of that paper contains the following note: "Wants to have monthly issue of permits regularly." The relevancy of this document and the sixth paragraph thereof will be dealt with in due course.

In C.C. No. 3397 of 1945 when first examined, R. K. Pillai stated in his plea that he was not prepared to say anything to explain the circumstances appearing against him but would submit a written statement. He however denied having himself handed the cover to Mr. Raghavachari. Jayaram Naidu also stated the same thing and did not wish to answer any further questions put by the Court. Subsequent to the framing of the charges however, a written statement was filed by Jayaram Naidu setting out the defence version and that version seems to have been also adopted by the other accused in C.C. No. 3397 of 1945. The same defence was put forward in C.C. No. 3398 of 1945. The defence version is this: R. K. Pillai is not the brother but only a friend of Jayaram Naidu. He (Jayaram Naidu) went to Mr. Satyamurthi on 27th November, 1945, with an application for an export permit on behalf of the Oriental Lungi Company in view of his acquaintance with Mr. Satyamurthi and to see if he could help the Lungi Company to get a permit. Mr. Satyamurthi then gave Jayaram Naidu to understand that there would be no difficulty in granting the permit to the company but requested Jayaram Naidu to prevail upon R. K. Pillai to contribute at least a sum of Rs. 3,000 to the Mylai Sangeetha Sabha of which Mr. Satyamurthi is the Secretary and the Provincial Textile Commissioner the President. This request of Mr. Satyamurthi was conveyed by Jayaram Naidu to R. K. Pillai: but since the proprietor was absent elsewhere, R. K. Pillai who was only a clerk, could not on his own responsibility pay such a large donation, but agreed to pay a sum of Rs. 1,000 as donation

to the Sabha on behalf of the company. Jayaram Naidu again visited Mr. Satyamurthi at his house on 28th November to ask if the permit had been given and he was told that the permit had been granted and that he could come and take it the next day. The next morning he went to Mr. Satyamurthi's house with Rs. 1,000 and handed over the amount after he had been told that the permit had already been ordered in the usual course. Just then a visitor, Mr. Narasimhan, came in the car and Mr. Satyamurthi went out to speak to him. A short while later the visitor went away and Mr. Satyamurthi returned and asked Jayaram Naidu to bring R. K. Pillai also with him to the office to take the permit that had been granted. Mr. Satyamurthi retained the cover containing the money. As directed he went with R. K. Pillai to the office and then he was told by Mr. Satyamurthi that the sum of Rs. 1,000 paid as donation to the Sabha was not sufficient and that it should be at least raised by another Rs. 500 and that the balance of Rs. 500 may be paid directly into the hands of the Joint Textile Commissioner by way of assuring himself that the entire amount was meant as donation to the Sabha. Both Jayaram Naidu and R. K. Pillai on hearing this, left the office and came back with the additional sum of Rs. 500 and asked Mr. Satyamurthi to take them to the Joint Textile Commissioner. They were ushered by him into Mr. Raghavachari's room and there, out of deference to the latter, they did not ask him any questions but quietly handed over the cover containing the sum of Rs. 500 required by Mr. Satyamurthi, believing in good faith that it would be taken as an additional donation to the Sabha, irrespective of the question of the permit. Both the accused denied that they offered or paid any bribe or abetted the offence. A suggestion was made in the statement that the Textile Department was vigorously collecting donations for the Mylai Sangeetha Sabha through its officers on an extensive scale, that they earnestly believed that there was no harm in making a contribution for a charitable purpose and that the donation that they paid had no relation to the permit that they had asked for, since they were given to understand by Mr. Satyamurthi first that there would be no difficulty in getting it and later that the permit had already been ordered to be given. As for the motive for putting up the case, it was suggested that since the activities of the officers of the Textile Department in this matter had become the subject of public talk, Mr. Satyamurthi wanted by this contrivance to make it appear that the officers of the department were out to put down every kind of corruption in their department.

In C.C. No. 3398 of 1945 which is concerned with the bribe said to have been given to Mr. Satyamurthi on the morning of the 29th November at his house, the main evidence is that of Mr. Satyamurthi himself as to what had happened at his house on that date. It is followed up by the evidence of Mr. Raghavachari with regard to the complaint made to him by Mr. Satyamurthi about this matter and the delivery to Mr. Raghavachari of another sum of Rs. 500. The learned Chief Presidency Magistrate taking into consideration a number of features noticed by him in the testimony of Mr. Satyamurthi, found himself unable to accept his evidence and came to the conclusion that the prosecution had not established that Jayaram Naidu, accused in that case, was guilty of having offered illegal gratification to Mr. Satyamurthi.

In C.C. No. 3397 of 1945 in which both R. K. Pillai and Jayaram Naidu are accused and which concerns the giving of a bribe of Rs. 500 to Mr. Raghavachari in the afternoon of the 29th November, in his office room, the learned Magistrate found that the amount was paid to Mr. Raghavachari because the accused were misled by Mr. Satyamurthi into believing that an additional sum by way of donation was being paid irrespective of the question of the permit. Upon these findings the learned Magistrate acquitted the accused in both the cases.

The contentions of the Crown in these appeals are twofold. The first contention is that the amounts were offered as bribe pure and simple and not as donations at all. It is argued that the learned Magistrate did not appreciate the evidence correctly and brought unnecessarily the affairs of the Mylai Sangeetha Sabha into the picture. The second contention is that even if the payments to both the

officers were in the nature of donations to the Sabha in which those officers were interested, they would still amount to illegal gratification within the meaning of section 161, Indian Penal Code and it is no defence to say that the money was not intended to be given personally to the officers concerned but was meant for the benefit of the public institution with which they were connected.

As pointed out there were two charges in each case. I shall deal with the second charge arising under the Defence of India Rules later. The first and the principal charge is the one under section 161 read with section 114, Indian Penal Code. The material portion of that section runs thus :

"Whoever, being . . . . . a public servant, accepts, or obtains . . . . for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person (with the Central or any Provincial Government or Legislature), or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

In the fourth explanation, the expression "a motive or reward for doing", is defined in this manner :

"A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words."

then comes illustration (*c*) to that section :

"*A*, a public servant, induces *Z* erroneously to believe that *A's* influence with the government has obtained a title for *Z* and thus induces *Z* to give *A* money as a reward for this service. *A* has committed the offence defined in this section."

We notice that the offering or giving of a bribe is not by itself made an offence under this section, but it is rendered punishable as an act of abetment if the requisite elements of abetment are present. Illustration (*a*) to section 109 says :

"*A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B's* official functions. *B* accepts the bribe. *A* has abetted the offence defined in section 161."

The case of an offer which is refused is provided for under section 116, *vide* illustration (*a*) which runs thus :

"*A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B's* official influence. *B* refuses to accept the bribe. *A* is punishable under this section."

To constitute an abetment of the doing of a thing, therefore, there should be, as required under section 107 an instigation to do that thing or conspiracy for the doing of it followed by an act or illegal omission in pursuance of that conspiracy, or intentional aid in doing the same by any act of illegal omission. To bring home to the accused the guilt under section 161 read with section 114, Indian Penal Code, it would be necessary for the prosecution to prove conclusively with regard to both the payments made to Mr. Satyamurthi and to Mr. Raghavachari that while making the payments they instigated or intentionally aided those officers to accept an illegal gratification for one or other of the purposes mentioned in section 161. the purpose adumbrated by the prosecution in this case being the granting of a permit which under the practice prevailing in the department or under the rules, the applicant was not entitled to get in the ordinary course. The case of the accused has always been that while it is true that they paid Rs. 1,000 to Mr. Satyamurthi on the morning of the 29th November, at his house and paid a further sum of Rs. 500 to Mr. Raghavachari the same afternoon in his office room, the payments were entirely independent of the application for permit that they had made and that they were given solely as a donation to the Mylai Sangeetha Sabha since contributions were being publicly invited for the building fund of the Sabha and were freely pouring in. They contend that there was no further question of the permit, as on the 27th November, itself, Mr. Satyamurthi had assured them that there would be no difficulty in getting it and on the 28th and 29th they had been told even before the money was given that the permit had already been ordered to be given. So there was no need to instigate or aid the doing of a thing which had already been done nor was the amount given to either of those officers

as a reward for the granting of a permit within the meaning of section 161, but was given expressly at the request of Mr. Satyamurthi that since the Sabha was a public institution, a donation might be obtained from the company. It is manifest therefore that the decision as to which version is correct would largely depend upon the weight that could be given to the testimony of Mr. Satyamurthi, for in one case, *i.e.*, the case in which the payment made to him is involved, the version rests exclusively upon his sole testimony, while in the other case concerning the payment to Mr. Raghavachari, Mr. Satyamurthi's version about the various matters leading up to that payment serves as the prelude, if not the foundation of that part of the case. Mr. Raghavachari's evidence by itself does not conclusively establish that the accused when they entered into his room and handed over the pasted cover, instigated him to accept illegal gratification for the purpose of granting a permit. The position might have been different if all that Mr. Satyamurthi has said as to what transpired before could be acted upon. But if that background fails, Mr. Raghavachari's evidence is not of much probative force having regard to the requirements of sections 107, 109, 114 and 161, Indian Penal Code. It becomes therefore necessary at the outset to assess the evidence of Mr. Satyamurthi. In assessing that evidence, I must recall to my mind the dicta of the Judicial Committee in *Sheo Swarup* v. *King-Emperor*[1], where stress has been laid upon the proper weight and consideration that should be shown by the High Court to the views of the trial Judge as to the credibility of the witnesses and as to the proper attitude of the appellate Court in regard to the findings of fact arrived at by a Judge who had the advantage of seeing the witnesses. After examining the various provisions in the Code bearing upon this question their Lordships said in that case :

"Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

This decision was recently reiterated by the Privy Council in *Nur Mohammad v. Emperor*[2], where it was observed that there was only one principle, in the strict use of the word, laid down in *Sheo Swarup* v. *King-Emperor*[1], that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion whether upon that evidence the order of acquittal should be reversed.

[His Lordship after considering the opinion expressed by the Chief Presidency Magistrate about the credibility of the evidence of Mr. Satyamurthi and the various defects and anomalies in the evidence in these two cases in general and in the evidence of Mr. Satyamurthi in particular, concluded as follows.]

In the face of these numerous defects some of which appear indeed to be very material, the question is whether in an appeal against acquittal this Court will interfere with the estimate of the trial Court as regards the credibility of Mr. Satyamurthi or disturb the findings of fact that that Court has reached based upon the evidence of the witnesses who were seen by it. I have no doubt on a review of the entire evidence upon which the order of acquittal in C.C. No. 3398 of 1945 (C.A. No. 615 of 1946) is founded that the conclusion reached upon that evidence can only be that the order of acquittal therein should not be reversed.

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1. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).
2. (1945) 2 M.L.J. 362 (P.C.).

[His Lordship then discussed certain features found in C.A. No. 614 of 1946 and concluded as follows.]

The learned Magistrate has on a close scrutiny of all the circumstances, come to the conclusion that the accused did not offer any illegal gratification to Mr. Raghavachari and that they paid the amount because they were misled by Mr. Satyamurthi into believing that it was expected as a further donation by Mr. Raghavachari for the Sabha irrespective of the question of the permit. On a review of the entire evidence and the attendant factors I am unable to hold that this conclusion is unwarranted.

In this view of the facts and the evidence in both the cases, it is, strictly speaking, unnecessary to go into the further question raised by the learned Advocate-General that even if the payments were made as donations to the Sabha while as a matter of fact the application of 27th November was still pending disposal, it would none the less amount to an offence within the meaning of section 161 read with section 114, Indian Penal Code, as it is immaterial whether the bribe was offered for the personal use of the officer concerned or for the benefit of an institution in which he was interested. The learned Advocate-General was fair enough to state in Court on behalf of the Crown that he was not interested in securing punishment for the respondents but was only desirous that the law should be correctly laid down.

The legal principle applicable to such cases is not and has never been in doubt. The principle was put in forcible language by Jardine, J., in *Imperatrix* v. *Appaji bin Yadavrao*[1]. In that case the Mahars of a certain village had been suspended from their office for some months. A meeting of the villagers was held at the house of the Patel at which the Patel was present, to consider the question of their restoration to office and an agreement was reached to which the Patel was a party to the effect that they should be restored to their respective offices on their paying a sum of Rs. 300 towards the repair of the village temple. The question for determination by the Court was whether what was done came within the meaning of section 161, Indian Penal Code and the learned Judge stated the law thus :

"The plain words (of section 161, Indian Penal Code) exclude the defence that the benefit bargained for was to go to somebody else, and also exclude the notion that an officer is protected if he agrees to let his official acts be swayed by the motive of accepting gratification to be used professedly for advancing some public, not private, object such as charity, science or religion. That kind of motive is different to the desire of private lucre ; but it may easily lead to oppression and the subject in the pursuit or enjoyment of a right ought not to be hampered by any thought of pleasing the officer by promising a subscription of any kind however laudable. Nor ought an officer to be affected in his duty to the Crown in dealing with a subject by such a consideration."

As a justification for this rule, the learned Judge also mentioned that in that case there was a danger that if the village Mahars paid Rs. 300 for restoration to office, they might make the enterprise profitable by illegal or dishonest practices, since in their capacity as village Mahars they had duties connected with the public revenue, the village police and the civil administration. In *Emperor* v. *Amiruddin Salebhoy Tyabjee*[2], this decision was followed. In the judgment of the learned Chief Justice he pointed out that he would be establishing a further dangerous precedent if he were to hold that an officer is protected if he agrees to allow his official act to be swayed by the motive of accepting a gratification to be used not for his own personal benefit but for some public object such as charity, science or religion. Both these cases were referred to and followed in a recent decision of a Division Bench of the Patna High Court in *B. K. Sen* v. *Rajeswari*[3]. In that case an Arms Act clerk, whose duty it was to put up to the Sub-Divisional Officer applications for gun licences, imposed on an applicant a condition precedent to the performance of that duty, *viz.*, that the applicant should invest Rs. 100 in war bonds. The learned Judges observed that it was not of course an attempt by the Arms Act clerk to obtain any monetary advantage for himself though one might assume that his efforts to persuade people to invest in war loans would redound to his advantage in the

1. (1897) I.L.R. 21 Bom. 517.
2. (1922) 24 Bom.L.R. 534.
3. (1945) I.L.R. 24 Pat. 138.

matter of his promotion. Nevertheless the demand of the Arms Act clerk amounted to an attempt to obtain a gratification not for himself, but for his employers as a reward for doing his official duty, to forward the petitioner's application for renewal of his licence to the Sub-Divisional Officer, and it constituted an offence under section 161 of the Code. It is to be noticed that both in *Imperatrix* v. *Appaji bin Yadavrao*[1] and in *B. K. Sen* v. *Rajeswari*[2], a connection was in fact established between the performance of the official duty and the demand or payment of the gratification. In the Bombay case the amount was demanded directly for the restoration of the Mahars to the office and in the Patna case the investment was asked for specifically for the performance of the clerk's duty of putting up the paper to the higher officer who had the power of granting the licence. The *sine qua non* is the establishment of such a connection before it can be said that the gratification offered is a motive or reward for any of the purposes mentioned in section 161, Indian Penal Code. Attention was invited also to *Lakshminarayana Aiyar*, In re[3]. In that case a village munsiff offered money to a Sub-Magistrate coupled with a request that the Magistrate should show favour to an accused person in a case pending in his Court. The object of the village munsiff in doing so was not to secure any benefit for that person for whom favour was solicited but to lay a trap for the Magistrate who was suspected to be a corrupt official. The village munsiff was evidently set up to do this act by others who wanted to establish direct evidence of the acceptance on the part of the Magistrate of a bribe in connection with a pending case. A Division Bench consisting of Sadasiva Aiyar and Phillips, JJ., heard the case and although they agreed in a broad sense that even the person who lays the trap is guilty of abetment of an offence under section 161, Indian Penal Code, they differed on the question of sentence and the case was referred to Spencer, J., who held that section 161 says nothing about the intention of the offender, but the fourth explanation to the section makes it clear that a bribe may be received as a motive for doing a thing that the public servant who takes the bribe has not the least intention of doing, and yet the offence will be complete. The learned Judge pointed out that the motive or reward mentioned in the section is the consideration for showing favour which is not necessarily identical with the motive or intention of the giver of the illegal gratification. In the end it was found that the act of the village munsiff amounted to an attempt to pervert the course of public justice and required to be punished severely and he confirmed the sentence awarded by the Magistrate. Here also it was definitely established that payment was avowedly made to a Judicial Officer in connection with a case pending before him. If, as in all the cases cited above, it had been affirmatively or by necessary inference from surrounding circumstances, established in the present case that the payment of Rs. 1,000 to Mr. Satyamurthi and of Rs. 500 to Mr. Raghavachari was made either as a motive for granting a permit (whether export permit or monthly permit) or as a reward for having already granted the export permit, there could be no doubt that the accused would be guilty under section 161 read with section 114, Indian Penal Code, in both the cases. But, as I have already found, no such connection has been established. On the contrary it has been established by the defence from all the attendant circumstances that the amounts were offered independently of the result of the application dated 27th November, 1945. I would for these reasons agree with the finding of the learned Chief Presidency Magistrate that the accused in both the cases have not been conclusively proved to have committed the offences under section 161 read with section 114, Indian Penal Code.

Now remains the second charge in each of these cases under rule 38 (5) read with rule 34 (6) (*c*) of the Defence of India Rules. Rule 34 (6) contains the definition of " prejudicial act " and clause (*c*) thereof runs thus :

> " to render . . . . . . any public servant incapable of efficiently performing his duties as such or to induce . . . . any public servant to fail in the performance of his duties as such."

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1. (1897) I.L.R. 21 Bom. 517.
2. (1945) I.L.R. 24 Pat. 138.
3. (1917) M.W.N. 831.

Rule 38 (5) provides the punishment for contravention of the above-mentioned rule. It was argued for the Crown that the case falls within both the parts of clause (*c*) and that while the second part, *viz*., inducing the public servant to fail in the discharge of his official duties is co-extensive with section 161, the first part dealing with the question of efficient performance of duty is of wider import and it was stressed that in the present case the offer of the money had in regard to both the officers affected the efficient performance of their duties. It is unnecessary to consider this argument for in neither of the two cases does the charge refer to the earlier part of the rule concerning efficient performance of duty. The prejudicial act with which the accused were charged is mentioned to be the inducement offered to each of the officers concerned to fail in the discharge of their official duties. For the reasons given with regard to section 161, Indian Penal Code, it must be held that there was no such inducement offered to them to fail in the performance of their duties and consequently no prejudicial act was committed by the accused in either of these two cases within the meaning of rule 34 (6) (*c*).

I would in the result dismiss both the appeals.

V.P.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE HAPPELL.

Naramsetti Venkatappala Narasimhulu and others .. *Appellants**

v.

Naramsetti Someswara Rao and another .. *Respondents.*

*Hindu Law—Partition—*Jyeshtabagam *received by father in partition with his brother—Ancestral property with respect to his sons—Daughter born pending disposal of suit for partition—Not entitled to provision for marriage expenses—Proper mode of providing for marriage expenses of daughter in a partition decree.*

The true nature of a partition arrangement is that each co-owner gets a specific property in lieu of his rights in all joint properties; that is to say each co-sharer renounces his rights in other common properties in consideration of his getting exclusive right to and possession of specific properties in which other co-sharers renounce their rights. It is thus a renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the other. On this view, the allotment at a partition of a '*Jyeshtabagam*' to the eldest brother means, as the term implies, no more than giving a larger share than would strictly be due to him and involves no gift by the younger brother or brothers. In such circumstances the eldest brother would hold the property as ancestral property in which his sons are entitled to a share.

In a suit for partition by minor sons suing by their maternal uncle as next friend, it must be deemed that they have become divided in status from the date of the plaint and hence a daughter who was born pending the disposal of the suit can have no legal claim against the plaintiffs' share of the family properties for her marriage expenses, as her right cannot stand on a higher footing than the claim of a son born subsequent to the division in the family.

The proper way for providing for the expenses of marriage of a daughter is to fix the amount and to declare a charge for a proportionate share of such amount on the properties allotted to the sons under a partition decree, and not to direct a payment of the same out of the family assets.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam, dated 2nd November, 1944 and made in O.S. No. 11 of 1944.

Y. Suryanarayana for Appellants.

G. Balaparameswari Rao and *V. Appa Rao* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal preferred by the Defendants from a preliminary decree in a suit for partition brought by the respondents. The plaintiffs are the sons of the first defendant by his first wife Gangamma. The second defendant is his son by his second wife Kausalyamma. There is no dispute that the parties were members of a Hindu undivided family on the date of suit

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* Appeal No. 319 of 1945. 3rd April 1947.

each being entitled to a 1/4th share in the family properties. The dispute in the appeal relates to the existence and the divisibility of certain assets and the provisions to be made for the maintenance and marriage expenses of the two unmarried daughters of the first defendant, one of whom was born during the pendency of the suit.

The main contention of the appellants relates to the claim put forward by the first defendant to the exclusive ownership of certain lands, about 12 acres in extent which are now worth a substantial amount. This item was allotted along with other items of family properties to the first defendant's share at a partition between himself and his younger brother Ramasami which was completed in 1935. The partition was effected by means of an award (Ex. D-3) of certain arbitrators to whom the dispute between the brothers was referred in October, 1932. After dividing the other family properties in equal shares, the arbitrators allotted the item referred to above (which was described in the schedule F attached to the award) to the share of the first defendant as his *Jyeshtabhagam*.

The award recites :—

"As out of individuals Nos. 1 and 2, individual No. 1 (i.e., 1st defendant) is elder and the first born and as individual No. 1 mainly carried on the affairs and much improved the property, we have settled the lands of the value of Rs. 3,035 mentioned in the *F* Schedule on individual No. 1 as *Jyestabhagam* and on account of their caste customs and consent given in the panchayathi agreement executed by individuals Nos. 1 and 2, we have agreed to the rate and directed the same to be given."

The first defendant claimed in the Court below that this item must be treated as his self-acquired or separate property not liable to be divided as between himself and his sons including the plaintiffs. The learned Judge below disallowed the claim. Mr. Y. Suryanarayana, learned Counsel for the appellants, did not, however, contend that the entire property was the separate property of the first defendant. He urged that, so far as Ramasami's half share in the property was concerned, there was in effect a gift of it by him to the first defendant who must accordingly be regarded as having acquired that share in his own independent right as a donee from Ramasami and it was not, therefore a divisible asset of the family. The argument was put thus : The agreement by the first defendant and Ramasami to appoint arbitrators to partition their family properties effected a severance of the joint status of the family, according to the decisions of the Privy Council in *Syed Kasam* v. *Jorawar Singh*[1], and *Harikishan Singh* v. *Partap Singh*[2], and each brother thus became entitled to a separated half share in all the family properties. When the properties were subsequently divided by metes and bounds under the award of arbitrators, the allotment of the entire item now in question, in which Ramasami had one half-share, exclusively to the first defendant as his *Jyeshtabagam* in excess of what was legitimately due to him operated as a gift of Ramasami's half share in the item, and such share must, therefore be regarded as his separate property in which his sons can claim no interest. The argument proceeds, in our opinion, on a misconception of the true nature of a partition arrangement under which each co-owner gets a specific property in lieu of his rights in all the joint properties ; that is to say each co-sharer renounces his rights in the other common properties in consideration of his getting exclusive right to and possession of specific properties in which the other co-owners renounce their rights. It is thus a renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the others. That is why it has been held that a partition can be effected orally and without any registered instrument though it may affect immoveable properties of the value of one hundred rupees or more. In *Gyannessa* v. *Mobarakannessa*[3], it was argued that a partition of immoveable properties involved an exchange of rights in such properties between the co-owners and could therefore be validly effected only by a registered instrument as provided by section 118 of Transfer of Property Act. The Court repelled the argument pointing

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1. (1922) 43 M.L.J. 676 : L.R. 49 I.A. 358 : I.L.R. 50 Cal. 84 (P.C.).
2. (1938) 2 M.L.J. 234 (P.C.).
3. (1897) I.L.R. 25 Cal. 210

out that the transaction involved nothing more than one co-owner taking a specific property in lieu of his undivided share in several properties. On this view of the transaction which, in our opinion is the true view, the allotment at a partition of a *Jyeshtabhagam* to the eldest brother means, as the term implies, no more than giving him a larger share than would strictly be due to him and involves no gift by the younger brother or brothers. Indeed, the terms of the award, Ex. D-3, extracted above do not admit of the transaction being interpreted as a gift by Ramasami of his share of the property allotted to the first defendant. It was the arbitrators who "settled" the allotment and "directed the same to be given". There are no words of conveyance by Ramasami who has signed the instrument only as a "witness".

In such circumstances, we are of opinion that the first defendant held the property in dispute, as he unquestionably held the other properties allotted to him, as ancestral family property to which his sons are entitled to share.

Reference was made by Mr. Suryanarayana to a decision of Venkataramana Rao, J., reported in *Subbarao* v. *Subbarao*[1]. There the allotment of a certain property as *Jyeshtabhagam* at a family partition was attacked subsequently by one of the brothers who consented to such allotment and his son who was a minor at the time. It was argued that the allotment was virtually an alienation by the father without any necessity and would be tantamount to a gift and therefore not binding on his son. The learned Judge rejected the argument observing that, in his opinion, "it is not accurate to regard partition as an alienation". He proceeded to distinguish *Venkata Reddi* v. *Kuppa Reddi*[2], thus :

"No doubt in *Venkata Reddi* v. *Kuppa Reddi*[2], where a mother represented her minor sons at a partition the allotment of an extra share to the eldest member of the family was held not binding on the minor sons and *it was held that the transaction may well be regarded as a gift* . . . . The position of the father is entirely different".

A reference to *Venkata Reddi* v. *Kuppa Reddi*[2], however shows that the words we have italicised do not correctly state the decision in that case. All that the learned Judge there held was that :

"the act of the mother in consenting to give an extra share to the managing member is not binding on the plaintiffs. The old idea of *Jyeshtabhagam* has now become obsolete and consequently the consent of the mother to Ramasami Reddi taking an extra share could not prejudicially affect the plaintiff."

The theory of implied gift was brought in to repel an argument that the extra share was thrown by the eldest brother into the hotch-pot so as to entitle the junior branch, with whom he was living in commensality, to a share therein. Such a transaction, it was observed, could only be regarded as a gift of half of the extra share to the junior branch and must be in writing and registered. Thus neither *Subba Rao* v. *Subbarao*[1] nor *Venkata Reddi* v. *Kuppa Reddi*[2] is of any assistance to the first defendant.

As regards the provision to be made for the two unmarried daughters of the first defendant, the Court below has directed a sum of Rs. 3,000 for each of them to be set apart out of the joint family assets. As already stated, the elder daughter was born before suit and is now about seven years old and the younger on the 13th May, 1944, pending suit. The first defendant claims that both of them are also entitled to maintenance out of the family properties and provision should be made in that behalf in the decree. Though it appears from the written statement of the defendants that a claim for the marriage expenses and maintenance was made on behalf of the first daughter who alone had then been born, the claim for maintenance does not appear to have been pressed at the trial, for no evidence has been adduced as regards the proper rate to be allowed and nothing is said about it in the judgment of the lower Court. There was some discussion before us as to whether

1. (1936) 71 M.L.J. 419. 2. (1918) 8 L.W. 400.

during the father's lifetime the son's share on partition is liable for the maintenance of the father's daughter. Reliance was placed for the defendants on the Full Bench decision in *Subbayya* v. *Ananta Ramayya*[1] which does seem to support the claim. It was, however, pointed out for the plaintiffs that the actual decision in the case related only to marriage expenses as no claim for maintenance was made or allowed. We consider it unnecessary to go into the question as we are of opinion that the first defendant should not be allowed to revive the claim at this stage, not having pressed the same in the Court below, as we do not have the advantage of a finding by that Court on the point. It would no doubt be open to the daughters who are not parties to these proceedings to put forward their claim in a separate suit of their own if they are so advised.

In the memorandum of cross-objections the plaintiffs have raised an objection to the marriage allowance awarded for the younger daughter. Mr. Balaparameswari Rao contends that, inasmuch as the plaintiffs who are minors suing by their maternal uncle as their next friend, must be deemed to have become divided in status from the date of the plaint as the suit has been found to be beneficial to them in the circumstances of the case (See *Rangasayi* v. *Nagarathnamma*[2]), the younger daughter who was born more than a year after the suit was instituted can have no legal claim against the plaintiffs' share of the family properties for her marriage expenses. Learned Counsel has submitted that an unmarried daughter's claim for marriage expenses which, according to the reasoning of the majority Judges in *Subbayya* v. *Ananta Ramayya*[1] already referred to, is traceable to her now obsolete right to a share in the family properties, cannot stand on a higher footing than the claim of the son born subsequent to a division in the family. This contention is, in our opinion, correct and must prevail. Ramesam, J., who delivered the leading judgment in the case referred to above observed:

> "It seems to me that in the early law both the rights of the sons and the daughters were imperfect rights of the property which cannot be materialized by compelling partition against the wishes of the father, but whereas the sons' right gradually developed into a right to compel partition, the daughters' right first became a right to compel partition against the brothers only and not against the father, and latterly degenerated into merely a right to maintenance and marriage expenses."
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> "I therefore infer that the right of the daughter for marriage expenses and for maintenance is a right over the joint-family property of the father and the brothers, and, though during the father's lifetime she cannot enforce such right in the form of a partition because of placitum 14 of the Mitakshara, still if the father is willing to exercise his discretion in favour of the daughter by giving something towards her marriage expenses, the joint-family property is liable towards such expenses."

Reilly, J., concurred in that view, while Jackson, J., dissenting held that at a partition between the father and the son, the daughter had no claim on the sons' share for her maintenance and marriage expenses. But even according to the majority of the Judges who upheld the daughter's claim, it rests on her right to participate in the joint family properties, and a daughter born after disruption of the joint status can have no such right any more than a son born after partition. It follows that a claim for the marriage expenses of the second daughter is unsustainable and must be rejected.

As regards the provision made by the lower Court for the marriage expenses of the elder daughter, Mr. Balaparameswari Rao submitted that the proper way of providing for such expenses was to fix the amount and to declare a charge for a proportionate share of such amount on the properties allotted to the plaintiff under the partition decree, and not to direct a payment of the same out of the family assets as was done by the lower Court. He drew attention in this connection to the similar provision made in *Subbayya* v. *Ananta Ramayya*[1] already referred to where Ramesam J., observed:

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1. (1928) 57 M.L.J. 826; I.L.R. 53 Mad. 4 (F.B.).
2. (1933) 65 M.L.J. 630: I.L.R. 57 Mad. 95 (F.B.).

"provided we safeguard the rights of parties, there is no harm in not actually setting apart the amount. It may be that the marriage may never come off for reasons which need not be suggested. It is enough to fix a maximum limit for the expenses of marriage and to make it a charge on one of the items of the plaintiff's property for one-third share."

We agree that provision for the marriage expenses of the girl who is only seven years old should be made in this form and not by the setting apart of the amount in cash. The decree will be modified accordingly.

(Their Lordships after discussing the evidence concluded as follows :)

The appeal and the memorandum of Objections are allowed to the extent indicated above, and the decrees of the Court below will be modified accordingly.

As regards costs, we direct the appellants to pay costs in the appeal and 3/4th costs in the Memorandum of Objections. The order as to costs in the lower Court will stand.

V.P.S. *Decree modified.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Nagpur.)

PRESENT :—LORD DU PARCQ, LORD MORTON OF HENRYTON AND SIR JOHN BEAUMONT.

Rao Bhimsingh .. *Appellant**

v.

Shersingh and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 50, 52, 53 and 2 (11)—Scope and effect of section 53—Natur and extent of property in the hands of a legal representative liable to execution under decree obtained against his predecessor in interest—Impartible estate governed by the rule of primogeniture—Decree against holder of estate for compensation in lieu of specific performance—Attachment during his life time—Liability of estate after his death to execution in the hands of his eldest son who has succeeded by survivorship.

Section 53 of the Civil Procedure Code appears to be designed to enlarge the class of property liable to execution under sections 50 and 52. This is effected by deeming certain property to have come into the hands of the legal representative as property of the deceased which in fact has not done so. The class of property to which this fiction is applied is "property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed." These words have to be read as descriptive of the class of property which can be reached in execution and not as limiting the nature of the debt for which execution can be levied.

Ganesh v. *Narayan*, (1931) I.L.R. 55 Bom. 709 and *Meyyappan* v. *Meyyappan*, (1923) 46 M.L.J. 471, approved.

On a question whether an estate which is impartible and governed by the rule of primogeniture and which is ancestral property which had been attached during the lifetime of the holder in satisfaction of a decree against him for compensation in lieu of specific performance remains liable after his death to execution in the hands of his eldest son who has succeeded by survivorship,

Held, that the son was the legal representative of the last holder of the estate and the decree holders were entitled therefore under section 50, Civil Procedure Code to apply to the Court to execute the decree against him. There was property in his hands of a character liable under Hindu Law, for the payment of a decretal debt of a deceased ancestor, and since the particular debt for which execution was being levied was not tainted with immorality, the property was liable in execution under section 50.

R. Ritson for Appellants.

Respondent *Ex parte*.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from the judgment and decree of the High Court of Judicature at Nagpur dated the 3rd October, 1939, which affirmed the judgment and decree of the District Judge of Nimar dated the 7th September, 1936, which in turn affirmed the judgment and decree of the Subordinate Judge of Khandwa, dated the 19th February, 1936.

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* P. C. Appeal No. 4 of 1943. 17th July, 1947.

The appeal arises in execution proceedings in the following circumstances.

In the year 1908, Rao Kishore Singh had instituted a suit against two widows to recover possession of an estate known as Bhamgarh Zemindary. In that litigation Kishore Singh was claiming that the Estate was an impartible one and had descended upon him under the rule of primogeniture as the eldest male descendant of the last holder. His claim, if successful, would clearly operate for the benefit of an eldest son who might succeed him. Kishore Singh obtained a decree in his favour from the trial Court, but the decree was reversed by the Court of the Judicial Commissioner of the Central Provinces. In order to raise money to enable him to prosecute an appeal to His Majesty in Council Kishore Singh on the 11th November, 1912, entered into an agreement with one, Ramji Patel, under which Ramji Patel was to advance Rs. 5,000, and if Kishore Singh succeeded in his appeal he was to sell a part of the said Estate to Ramji Patel on the terms specified in satisfaction of the loan.

Kishore Singh succeeded in his appeal before the Judicial Committee of the Privy Council but refused to carry out his agreement with Ramji Patel. Accordingly Ramji Patel instituted a suit in the Court of the District Judge of Nimar asking for specific performance of the said agreement or in the alternative an order for repayment of the amount advanced with interest. That suit also ultimately went in appeal to His Majesty in Council and the Judicial Committee held that Ramji Patel was entitled to specific performance of the agreement of the 11th November, 1912, but that compensation in money would afford adequate relief. Accordingly by Order in Council dated 10th May, 1929, Their Lordships reported to His Majesty that a decree should be made in favour of the appellant for Rs. 20,000 with interest thereon at the rate of 6 per cent. per annum until realisation and that there ought to be paid to the appellant certain costs of the appeal.

A decree was duly passed pursuant to the said Order in Council and prior to the death of Kishore Singh part of the Bhamgarh Estate was attached in execution of such decree. Kishore Singh died on the 11th August, 1930, and the present appellant as his eldest son succeeded to the Bhamgarh Estate and was thereupon brought on record in the execution proceedings as legal representative of Kishore Singh.

On the 8th December, 1930, the appellant made an application to the execution Court asking for a stay of execution to enable him to raise the money due. He did not suggest that the decree could not in law be executed against him. However, on the 12th March, 1934, the appellant made a further application in the said execution proceedings alleging that the property under attachment formed a part of the Bhamgarh Estate which was impartible and governed by the law of primogeniture ; that the property had been attached in a personal decree against Kishore Singh ; and that the property in dispute was not an asset of the late Kishore Singh in the hands of the appellant who claimed to be the sole owner ; and the appellant prayed that the property be released from attachment and the execution be stayed.

This application was dismissed by the Judge in the execution proceedings on the 19th February, 1936. The appellant appealed to the District Judge and his appeal was dismissed on the 7th September, 1936. He then presented a second appeal to the High Court of Judicature at Nagpur which was dismissed on the 3rd October, 1939. From that judgment this appeal has been brought on the certificate of the said High Court. The respondents are the representatives of Ramji Patel and have not appeared before the Board.

In all the three Courts in India the principal question argued was whether the Bhamgarh Estate was inalienable by custom. All three Courts held that such a custom was not proved, and their Lordships are not prepared to disturb these concurrent findings.

If the Bhamgarh Estate was the separate property of Kishore Singh it is clear that it would be liable in execution for the discharge of the debt in the hands of

the appellant as his heir. But the Courts in India have proceeded on the basis that the estate is ancestral property, though impartible and governed by the rule of primogeniture, and their Lordships deal with the appeal on the same basis. The question for decision is whether an estate of this nature which had been attached during the lifetime of the father in satisfaction of a decree against him for compensation in lieu of specific performance remains liable after his death to execution in the hands of his eldest son who has succeeded by survivorship. The answer to this question depends on three sections of the Civil Procedure Code which it will be convenient to state.

Section 2 (11) defines "legal representative" as meaning a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

Section 50 provides :—

"(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased. (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit."

Section 53 provides :

"For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative."

Section 52 deals with a decree passed against a legal representative of a deceased person and has no direct application in the present case.

The High Court held that section 50 did not help the decree-holder because no property of the deceased Kishore Singh had come to the hands of his son, and that section 53 did not apply because in their view the section only applied in cases in which a decree for a debt had been passed and the decree against Kishore Singh was not for a debt, but for money payable in lieu of specific performance. But the Court held that the present appellant was a legal representative of Kishore Singh under the latter part of section 2 (11) of the Civil Procedure Code, since Kishore Singh had been sued in a representative capacity, and apparently considered that on this finding the decree could be executed against the appellant. This view of the matter appears to their Lordships to overlook the fact that section 2, sub-section (11) of the Civil Procedure Code is merely a definition section and imposes no liability at all. If the High Court was right in thinking that the case did not fall under section 53 of the Code the appellant, in their Lordships' opinion, must succeed.

Their Lordships think that the appellant is the legal representative of Kishore Singh, and the respondents were entitled therefore under section 50 to apply to the Court to execute the decree against him. By itself, however, section 50 would not assist the decree-holder since there was no property of Kishore Singh which had come to the hands of his legal representative. But then comes section 53 which appears to be designed to enlarge the class of property liable to execution under sections 50 and 52. This is effected by deeming certain property to have come into the hands of the legal representative as property of the deceased which in fact has not done so. The class of property to which this fiction is applied is "property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed." Their Lordships read these words as descriptive of the class of property which can be reached in execution, and not as limiting the nature of the debt for which execution can be levied. In the present case there is property in

the hands of a son of a character liable under Hindu law for the payment of a decretal debt of a deceased ancestor, and since the particular debt for which execution is being levied is not tainted with immorality, the property is liable in execution under section 50. This view of the construction of section 53 has been adopted by the Bombay High Court in *Ganesh* v. *Narayan*[1], and by the Madras High Court in *Meyyappan* v. *Meyyappan*[2]. In the former case, in which the Court was dealing with the execution of a decree for an injunction obtained against a Hindu father as manager of a joint Hindu family against a son who had succeeded by survivorship, Mr. Justice Patkar made the following pertinent observations in which their Lordships concur :

"It is difficult to hold that section 53 is limitative and not descriptive, and is intended merely to enforce a recognised rule of Hindu law that a son is liable to pay the debt of his father which is not tainted by illegality or immorality. Section 50 is not limited to the execution of a decree for a debt but applies to all decrees. Section 53 appears to have been enacted to explain the meaning of the expression "property of the deceased" which occurs in sections 50 and 52. If section 53 is considered to be not descriptive but limitative and confined to a decree for debt, and if a joint son is not considered to be the legal representative of his father under section 50 of the Civil Procedure Code a decree for possession or a decree other than for a debt obtained aginst a father in a joint Hindu family would not be enforceable in execution against the son who is joint with his father and is brought on the record as his legal representative. Further, a son who is joint with his father is always brought on the record on the death of a deceased plaintiff or defendant or a deceased appellant or respondent as his legal representative, and no distinction has ever been made between a son who is joint with his father and a son who inherits the property of his father."

If the view of the Nagpur High Court is right, and section 53 is limited to cases in which execution is being levied for a debt in respect of which decree has been passed, the section would have a very limited operation. At the most it could serve merely to render a son of a Hindu liable in execution for a debt of his father for which he could be made liable in a suit under the pious obligation, a result which can generally be obtained by the exercise of the power conferred on the Court by section 47 (2) of the Civil Procedure Code to treat a proceeding in execution as a suit.

Their Lordships however agree with the conclusion reached by the High Court, though not with all the reasoning on which it is based and will humbly advise His Majesty that this appeal be dismissed. The respondents have not appeared but will be entitled to any costs they may have incurred.

Solicitors for Appellant: *Douglas Grant and Dold*.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

RM. M. SM. SV. Sevugan *alias* Manickavasagam Chettiar .. *Respondent.*

Income-tax Act (XI of 1922), sections 33 (4), 35 and 66 (1)—Rectification pursuant to section 35 of an error in the order of the Appellate Tribunal—If an order within the meaning of section 33 (4)—Section 66 (1) if enables a case to be stated in respect of it—Objection as to competency of reference—Power of High Court.

The rectification of an error in the order of the Appellate Tribunal pursuant to section 35 of the Income-tax Act, cannot be said to amount to the passing of a new order, which gives a right to either party to apply to the Tribunal requiring a case to be stated referring a question or questions for the opinion of the High Court arising out of the order in which the correction is made. The granting of the application for rectification and the correction of the error is not an order within the meaning of section 33 (4) of the Act nor one in respect of which section 66 (1) enables a case to be stated.

It cannot be contended that when a case has been stated by the Tribunal to the High Court containing a question the High Court has no province other than to express its opinion and to give

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1. (1931) I.L.R. 55 Bom. 709. 2. (1923) 46 M.L.J. 471.

* Case Referred No. 1 of 1946. 11th December, 1947.

its answer to the question and that it cannot consider the correctness or otherwise of the reference by the Tribunal. If the Tribunal improperly or incorrectly makes a reference in violation of the provisions of the statute, the High Court is capable of entertaining an objection to the statement of the case, and, if it comes to the conclusion that it should never have been stated, the High Court is not compelled to express an opinion upon the question referred.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939, (Act VII of 1939) in 66 R. A. 94, Madras of 1944-45 on its file.

C. S. Rama Rao Sahib for Applicant.

S. Swaminathan for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This reference is made by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act, at the instance of the Commissioner of Income-tax, Madras. The question referred to this Court is the following :

"Whether in the circumstances of the case where it has been held that the liability of a Hindu undivided family after disruption has been imposed upon the members thereof the order of the tribunal that the appeal is allowed could be sustained."

At the outset, learned counsel on behalf of the respondent-assessee, raised a preliminary objection that this reference is incompetent, and should not have been made by the Tribunal since the application by the Commissioner for a case to be stated, pursuant to section 66 (1) of the Act, was made after the expiration of 60 days following the passing of the order by the Tribunal. In considering this objection reference is necessary to some material facts.

Prior to 1938, the assessee was the karta of a Hindu undivided family. In that year there was a disruption and partition. Subsequent to that event, the Income-tax Officer, acting pursuant to the provisions of section 34 of the Act, sought to assess the previous undivided family in respect of income which had been subjected to tax. The assessment was effected on the assessee, as karta of the Hindu undivided family. The assessment was upheld by the Appellate Assistant Commissioner. The assessee appealed to the Appellate Tribunal and the appeal was allowed. The order allowing the appeal was made on July 11, 1944. In the statement, expressing the reasons for the order allowing the appeal, it is said that :

"after the disruption, the liability, if any, of the family had been imposed on a firm composed of the members of the divided family ; there is no provision in law for such imposition ; the assessment is illegal, and, therefore cancelled."

The Tribunal further observes that the merits had not been considered in light of the view expressed. The order, to which reference has just been made, is clearly one coming within the provisions of section 33 (4) of the Act.

Section 66 (1) of the Act provides that, within sixty days of the date upon which service of an order under section 33 (4) is made, the assessee or the Commissioner may, by an application in the prescribed form, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order. The exact date upon which the Commissioner was served with the order made by the Tribunal on July 11, 1944, has not emerged, but it was not long after the date of the disposal of the matter by the Tribunal. On October, 5, 1944, an application was made to the Tribunal by the Income-tax Officer to correct a statement contained in the statement of facts in the order ; the mistake being, that the assessment had been made upon a firm, whereas, in fact, it had been made upon the karta of the late joint family. That application was pursuant to section 35 (1) and (2) of the Act. Sub-section (1) enables the Commissioner or the Appellate Assistant Commissioner to rectify any mistake, apparent from the record, in an order passed by him. Such rectification can be made within four years from the date of the order. Sub-section (2) makes the provisions of sub-section (1) applicable to rectification of mistakes by the Appellate Tribunal. The application for rectification received disposal by the Tribunal on 17th January, 1945, when it directed that in the place of the words :

"After the disruption the liability, if any, of the family has now been imposed on a firm composed of the members of the divided family."

the following words be substituted :

"The liability, if any, of the family has now been imposed on the disrupted members of the family, by a notice served on a member, who was before the disruption a karta of the family, on behalf of the Hindu undivided family."

Although that rectification was made, there was no alteration in the order of 11th July, 1944, allowing the assessee's appeal. An application, made by the Commissioner at the same time praying the Tribunal to review or revise its order, was rejected, and properly so.

The effect of the rectification by substitution of other words in the place of those which had formerly appeared, is, it will be assumed, to make the order of the Tribunal, allowing the appeal, an incorrect order, since a different conclusion would follow from the substituted words that follow from the words which they replaced. The question, which is referred in this case, would have, of necessity, to be answered in favour of the Commissioner. That would be in the absence of the Tribunal having considered the merits. On October 7th, the Commissioner made an application under section 66 (1) of the Act, requiring the Tribunal to refer to this Court the question as to the correctness of its decision in the order of 11th July, 1944. That application received disposal on the same day as the application for rectification, namely, 17th January, 1945, when the application under section 66 (1) was withdrawn by the Commissioner and was dismissed. The application to the Tribunal for a case to be stated, in respect of which this reference has been made, was preferred on 29th March, 1945. Whilst the application, which was preferred on 7th October, 1944, for a case to be stated, was made within the time prescribed by the sub-section, the other application preferred on 29th March 1945, was made after the limitation time of sixty days provided in section 66 (1) of the Act, had expired after notice of the order of 11th July 1944, served upon the Commissioner. But it was in time, if the order on the application for rectification made on 17th January, 1947 was an order within the contemplation of section 33 (4) and section 66 (1).

Learned Counsel for the assessee contended that this reference is incompetent since the application made on 29th March, 1945, was out of time and, also, that the rectification directed on 17th January, 1945, is not an order in respect of which a case can be stated.

Section 35 has limited application. It enables rectification to be made of any mistake, apparent from the record, either on his own motion by the Commissioner or the Appellate Assistant Commissioner or by the Appellate Tribunal on their own motion, or when such a mistake is brought to their notice by an assessee. Clearly that section does not enable an order to be reversed by revision or by review but permits only some error, which is apparent on the face of the record, to be corrected.

If the contention, on bahalf of the Commissioner, is correct, that when an order for rectification is made there is a fresh order by the Tribunal, then the consequences are somewhat startling. Section 66 (1) enacts that an application to the Tribunal to refer a question of law to this Court shall be made within sixty days of service of notice of the order upon the commissioner or the assessee, as the case may be; if the application is not made within the specified period of time, then that right has gone and, it follows, the Tribunal has no jurisdiction or authority thereafter to refer any question of law, arising out of its order, to the Court. Rectification pursuant to section 35 can be made within four years from the date of the order. If the Commissioner's contention be correct, then if, after the expiration of the sixty days prescribed in section 66 (1) some rectification is made to an order, even three or four years later, the right given under section 66 (1) which has been lost by the expiration of the period prescribed, is revised and either the Commissioner or the assessee, as the case may be, years after the order has been made

by the Tribunal, can make an application for a case to be referred to the High Court. That clearly was never the intention of the Legislature. In the present instance, the Commissioner realised the period during which the application was required to be made for a case to be stated, inasmuch as his application was preferred on 7th October, 1944, which was well within the period prescribed by section 66 (1) in respect of the other order passed by the Tribunal on 11th July, 1944; but that application was withdrawn and dismissed. Now it is sought to obtain, in another way, what was lost when the earlier application was withdrawn. I am unable to accept the argument that the rectification of an error is the passing of a new order, which gives a right to either party to apply to the Tribunal requiring a case to be stated referring a question or questions for the opinion of the High Court arising out of the order in which correction is made. Were it so, even a minor rectification is an order, *e.g.* of a sum of money or of a date, made after the limitation period in sub-section (1) of section 66 has expired, would enable an application to be made for a case to be stated in respect of the order, upto four years from the date of its having been made. Further, in the present instance, the rectification was not made by the Tribunal upon its own motion nor at the instance of the assessee, as sub-section (1) of section 35 requires; but it was made upon an application by the Income-tax authorities.

In my opinion, the time during which an application could have been made to the Tribunal, for a case to be stated to this Court, commenced from the date of service of the notice of the order of 11th July, 1944, upon the parties and expired sixty days thereafter. The granting of the application for rectification and correct ing the error in the order of 17th January, 1945, was not an order within section 33 (4) of the Act nor one in respect of which section 66 (1) enables a case to be stated. It follows that the application made on 29th March, 1945, for the present case to be stated, was out of time and the Tribunal should not have referred this case, with the question in it, to this Court.

Mr. Rama Rao Sahib, on behalf of the Commissioner contended that, when a case has been stated by the Tribunal to this Court, containing a question, this Court has no province other than to express its opinion and to give its answer to the question; it cannot consider the correctness or otherwise of the reference by the Appellate Tribunal. If that argument is correct, then assuming that the Appellate Tribunal deliberately ignored the provisions of section 66 (1) and entertained an application for a case to be stated long after the expiration of the limitation period, even when this Court is apprised of that circumstance, it can do nothing save, in effect, abide the direction of the Appellate Tribunal. That is a position to which I certainly refuse to subscribe.

In support of that contention reference was made to the observations by their Lordships of the Judicial Committee, in *Sir Rajendra Narayan* v. *Commissioner of Income-tax*[1], that the function of the High Court in case under section 66 of the Act is advisory only and is confined to considering and answering the actual question referred to it. In my view these observations were not made with respect to the right of the High Court to consider the competency of a case referred to it. If the Tribunal improperly or incorrectly makes a reference in violation of the provisions of the statute, this Court is capable of entertaining an objection to the statement of the case, and, if it comes to the conclusion that it never should have been stated, this Court is not compelled to express an opinion upon the question referred.

In my opinion, for reasons given the preliminary objection should prevail and the assessee should receive his costs, Rs. 250.

Yahya Ali, J.—I agree.

V.S. *Reference held to be out of time.*

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1. (1940) 8 I.T.R. 495 (P.C.): A.I.R. (1940) P.C. 158.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Jayarama Chettiar .. *Petitioner.**

Madras General Sales Tax Act (IX of 1939), section 2 (h) and 15 (a)—Finished silver article exchanged for equivalent weight of silver and manufacturing charges in cash—Sale and not barter—Omission in return due to wrong view of law and not inadvertence—Wilful omission and an offence under section 15 (a).

The petitioner who is a dealer in silver wares and gold jewels and an assessee under the Madras General Sales Tax Act furnished a return in Form 'A' which did not admittedly include the value of a certain weight of silver relating to silver articles sold by him. The justification for the non-inclusion of the value of this weight of silver according to the petitioner was the practice followed by him of selling the articles not for money consideration but for an equivalent weight of silver as well as actual manufacturing charges in cash and that such a transaction was not a sale under the Act.

Held (i) The definition of 'sale' in the Act is much wider in scope and amplitude than the corresponding definition in the Sale of Goods Act and the transaction in question was a sale within the meaning of the General Sales Tax Act and not merely barter. (ii) The petitioner was guilty of an offence under section 15 (a) of the Act as he wilfully submitted an untrue return. Though the Legislature when using the word 'wilfully' did not intend that the person who submits an untrue or incorrect return should necessarily have the idea that he was committing an offence, yet the word has been inserted in section 15 to exclude cases of inadvertence or mistake but not cases where the omission was due to a wrong view of the law or ignorance of the law.

Case-law discussed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions of West Tanjore Division dated the 27th day of January, 1947, and made in Criminal Appeal No. 165 of 1946, (C.C. No. 96 of 1946 Sub-Divisional Magistrate, Kumbakonam).

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Petitioner.

Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The true and proper construction of sections 2 (*h*) and 15 (*a*) of the Madras General Sales Tax Act, 1939, will determine the contention raised regarding the guilt or innocence of the petitioner.

The essential facts cannot be disputed and shortly stated they are that the petitioner who is a dealer in silver wares and gold jewels in Kumbakonam Town and an assessee under the General Sales Tax Act, furnished a return on the 15th April, 1946, Ex. P-1, in Form 'A' for the year 1945-1946 which admittedly did not include the value of 15,322-1/8 tolas weight of silver relating to the silver articles sold by him. The justification for the non-inclusion of the value of this weight of silver according to the petitioner, is the practice followed by him to sell the articles, not for proper money consideration but only after getting back the equivalent weight of silver from the customers, for the precise quantity of the silver utilised in the manufacture of the article or articles. I think it can be taken as proved that when the petitioner gave a finished silver article to a customer, he took back the equivalent weight of silver as well as the actual manufacturing charges in cash. It was only the cash received as the making or manufacturing charges, that was brought into the account and the quantity of silver was omitted from the account and from the 'A' return. According to the finding of the trial Court, the petitioner has not brought into the account and the 'A' return a sum of Rs. 20,110 being the price of 15,322 1/8 tolas of silver at the flat rate of Rs. 1-5-0 per tola. Rejecting the contention to the effect that under the law he was not bound to include this amount in his 'A' return, both the lower Courts have convicted the petitioner of an offence under section 15 (*a*) though the appellate Court reduced the fine of Rs. 1,000 imposed on him by the trial Court and fined him a sum of Rs. 200 only.

Mr. Jayarama Aiyar for the petitioner urges that the transaction in question will not amount to a sale as defined in section 2 (*h*) which is as follows :

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* Crl. R. C. No. 375 of 1947. 16th January, 1948.
(Crl. R. P. No. 361 of 1947).

"'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge."

Reference is made to the definition in the Sale of Goods Act, Act III of 1930, section 4, where a contract of sale is defined and from a comparison of these two sections, I am asked to infer that the petitioner's action is not a sale but what is popularly known as barter. The definition of 'sale' in the General Sales Tax Act, is, in my opinion, much wider in scope and amplitude than in the Sale of Goods Act. According to this latter Act, a contract of a sale of goods is a contract whereby a seller transfers the property in goods for a price. The word 'price' is defined as money consideration for a sale of goods, so that in the case of a sale or contract of sale under the Sale of Goods Act it is an essential requisite that the consideration should be money. But in order to bring a transaction within the ambit of the term as defined in the Madras General Sales Tax Act, it need not necessarily be that money alone, should be the consideration. Every sale under the Sale of Goods Act is certainly a sale under the General Sales Tax Act but every "sale" under the General Sales Tax Act, will not come within the definition of the term in the Sale of Goods Act, *e.g.*, if a person transfers the property in goods to another in the course of trade or business for cash or for deferred payment or other valuable consideration, it is a 'sale' within Madras Act IX of 1939, but unless there is money consideration for the sale, the transaction will not amount to a sale under Act III of 1930.

Whether the quantity of silver received by the petitioner from his customers in the course of the transactions in the present case will come within 'other valuable consideration' is the point for consideration. When the property in a finished silver article is transferred to a purchaser in exchange for an equivalent weight in silver along with a sum of money equal to the manufacturing or making charges, the sale becomes complete because the consideration for the sale is cash plus the quantity of silver. Such a transaction may not amount to a sale under the Sale of Goods Act, as the price does not consist of money consideration alone but it is certainly a sale within the meaning of the term in the General Sales Tax Act, since the material in the silver received by the petitioner is a valuable metal.

Mr. Jayarama Aiyar's attempt to explain away the words "other valuable consideration" as being *ejusdem generis* with cash or deferred payment does not appeal to me. He contended that the words 'other valuable consideration' are intended to cover promissory notes, bills of exchange and hundies, etc., which according to him, will not be cash or deferred payment. According to this argument, if a person sells certain articles in consideration for a promissory note executed by the purchaser or a bill of exchange or the other negotiable instrument, it would not amount to a sale under the Sale of Goods Act. I am unable to agree with this argument. A decision of the Court of Appeal in *Robinson* v. *Graves*[1] where Greer, L.J., quoting a passage from Benjamin on Sales has discussed the meaning of the term 'sale' was cited in support of this argument. I do not think that the decision justifies the contention of the learned counsel. Another decision on which reliance was placed is *Misa* v. *Currie*[2], where the House of Lords decided that a draft drawn for the amount of bills of exchange purchased for transmission abroad, which amount by the usage of the bill brokers was due on the first foreign post day next after the purchase and which draft was dated as of that day, was an order for the payment of money on demand and such a draft or order made by a person who has sold the bills and addressed to the purchaser of them constitutes a valuable consideration for a cheque given by the purchaser of the bills. I fail to see how this decision is applicable to the facts of the present case. The question considered by their Lordships was whether there was valuable consideration or not for the cheque issued by the purchaser and their Lordships were unanimous in holding that there was valuable consideration.

I am next asked to say that the transaction in question is a barter and not a sale. The word 'barter' is defined in Wharton's Law Lexicon page 99, as "to

1. (1935) 1 K.B. 579. 2. (1875-76) 1 A.C. 554.

exchange one commodity for another." I very much doubt whether the exchange of a finished silver article for an equivalent weight of silver along with the making charges is the exchanging of one commodity for another. No authority has been brought to my notice where the word has been understood in that light. In the Oxford Dictionary the word is defined as :

> "the computation of the quantity or value of one commodity to be given for a known quantity and value of another."

This shows that 'barter' implies the reciprocal transfer of different commodities, *e.g.*, if the petitioner received as consideration for the sale of his silver articles any article made of a different metal, it will amount to a barter ; but not in a case where the same commodity in a different form is exchanged. In these circumstances, the first contention raised by the learned counsel that the 15,322-1/8 tolas of silver cannot be the subject of sale has to be rejected.

The further point raised is that even if there was a sale with respect to this quantity of silver the petitioner did not wilfully submit an untrue return. That the return is untrue admits of no doubt in view of my decision on the first point. On the authority of the decision in *Hudson* v. *Official Liquidator*[1], where the word 'wilful' has been the subject of consideration by the learned Judges, it is contended that there was no wilful act done in this case. The learned Judges of the Allahabad High Court relying upon a number of English cases have held that the adjective 'wilful' in wilful acts or defaults has evidently been used as a description and not as a definition. They say :

> "The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as the result of non-exercise of will due to supine indifference although the defaulter knew or was in a position to know that the loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. We have also to eliminate the elements of accident or inadvertence or honest error of judgment. The default must be the result of deliberation or intent or be the consequence of a reckless omission. "Wilful default" therefore, is indicative of some misconduct in the transaction of business or in the discharge of duty of omitting to do something either deliberately or by a reckless disregard of the fact, whether the act or omission was or was not a breach of duty."

That was a case where some officers of a company were sought to be proceeded against by the Official Liquidators for their wilful default or negligence. I am of the view that the words which formed the subject-matter of consideration there, are not *ad idem* to those in the present case. In *Ardeshir Bhicaji* v. *The Agent, G.I.P. Railway Company, Ltd.*[2], the Lord Chancellor in delivering the judgment of the Board interprets the words 'wilful neglect' relying upon *The Queen* v. *Robert Downes*[3] and *The Queen* v. *Senior*[4], as meaning that the Act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. In In re *City Equitable Fire Insurance Co., Ltd.*[5], the Court of Appeal has observed that an act or omission to do an act is wilful where the person who acts or omits to act, knows what he is doing and intends to do what he is doing ; but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.

One has to make a distinction between wilful neglect and a wilful submission, as in this case. If the petitioner by inadvertence or oversight or mistake omitted to include these amounts in the "A" return, then it is not a wilful act. But on the other hand, under the impression that this amount is not taxable and therefore need not be included in the return, he omits to make mention of it in the "A" return with the wilful knowledge of his having omitted the same, in my opinion, he has wilfully omitted it. It need not necessarily be that in making such omission he should know that it was improper or criminal. The word 'wilfully'

1. A.I.R. 1929 All. 826.
2. (1927) 54 M.L.J. 167 : L.R. 55 I.A. 67 : I.L.R. 52 Bom. 169 (P.C.).
3. (1875) 1 Q.B. 25.
4. (1899) 1 Q.B. 283.
5. (1925) 1 Chanc. 407.

has been inserted in section 15 to exclude cases of inadvertence or mistake but not cases where the omission was due to a wrong view of the law or ignorance of law. The word 'wilfully' in relation to crimes has been used in sections 405 and 477-A, Indian Penal Code. In order to make it an offence under section 477-A, the falsification should be wilful and with an intent to defraud, so that a mere wilful act without an intention to defraud will not be an offence under section 477-A, Indian Penal Code. Comparing the expression there, with the term used in section 15 of the General Sales Tax Act, I am inclined to hold that the distinction is real. It is not necessary for the application of section 15 that there should be a criminal intent which, on the other hand, is a necessary pre-requisite, under section 477-A, Indian Penal Code. In construing the word 'wilfully' a decision of the Queen's Bench Division in *The Queen* v. *Senior*[1], containing the dicta of Lord Russell of Killowen, L.C.J., is helpful. In that case, a certain person who belonged to a sect who objected on religious grounds to calling in medical aid and to the use of medicines, was convicted under the Prevention of Cruelty to Children Act, 1894, for wilfully neglecting the child in a manner likely to cause injury to his health, etc. His Lordship took the view that if the Act was done deliberately and intentionally and not by accident or inadvertence, even if the act was *bona fide* it amounted to a crime in the case of the prisoner who was a conscientious objector to the use of medicine or medical aid. The Lord Chief Justice observed that because the prisoner was proved to be an affectionate parent and was willing to do all the things for the benefit of the child except the one thing which was necessary in that case, *viz.*, providing of medical aid for the child, he cannot be heard to say that there was no wilful neglect. I am emphasising this point to show that when the Legislature used the word "wilfully" in section 15 it would not have intended that the person who submits an incorrect or untrue return should necessarily have the idea that he was committing an offence. An earlier case reported in *The Queen* v. *Robert Downes*[2], also supports the same view. Mr. Jayarama Ayyar conceded that the omission to include the value of 15,322-1/8 tolas of silver in the "A" return was not the result of any mistake, inadvertence or oversight. It was due to the circumstance that in the previous year of assessment, also, there was such non-inclusion and the authorities did not take note of that omission. As the learned Sessions Judge has pertinently observed, there is nothing to show that the authorities expressly or impliedly accepted such a return as true with the full knowlege of the omission. The learned Judge rightly took the circumstance into consideration in reducing the fine imposed by the trial Court.

For the above reasons, I am of opinion that the conviction of the petitioner is correct and in the circumstances of the case and considering the turnover of his business a fine of Rs. 200 is not excessive. The Revision is therefore dismissed.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

Penukonda Rathakrishnamurthy .. *Appellant**

v.

Messrs. Ganamukala Chengalraya Chetty Chalamayya Chetty & Co. and another .. *Respondents.*

Arbitration—Award—Separate sets of contracts—Reference to arbitrators—Agreed award on one set of contracts—Reference to umpire regarding other set of contracts—Validity—Arbitration Act (X of 1940), *section* 30 *—Application to set aside award—Seller and buyer of goods—Application for delivery.*

The arbitration related to five contracts between the buyer and seller of various quantities of yarn. The arbitrators agreed regarding two contracts of December 1941 *vaida* or delivery. They

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1. (1899) 1 Q.B. 283.
2. (1875) 1 Q.B. 25.

* O. S. A. No. 48 of 1946. 17th November, 1947.

disagreed with regard to three remaining contracts which were for January 1942 *vaida*. The arbitrators made two awards, first with respect to the two contracts upon which they agreed, and secondly, respecting the three contracts upon which they disagreed. As regards the latter, they referred the matters for decision by the umpire who gave an award. One of the parties applied under section 30 of the Arbitration Act to set aside the award. It was shown that one of the bye-laws of the association of which the parties were members and by which they were bound provided that the arbitrators or umpire shall have power to make an interim award.

Held, that the award which the arbitrators made relating to the subjects upon which they had disagreed was an interim award as contemplated by the bye-law in question and that under the circumstances it was unnecessary for the matters upon which the arbitrators had agreed to be referred to the umpire and that the award was not liable to be set aside on the ground that the umpire had not taken cognizance of the entire subject-matter of disputes between the parties.

Where a resolution of the Yarn Merchants Association provided that the seller should demand on or before the 20th of the *vaida* or delivery month and the buyer to give despatching instructions to the seller on or before the 24th of that month ;

Held, that the effect of the resolution was that the buyer must give the despatching instructions by the 24th of the *vaida* month provided the seller demanded those instructions from him. The obligation was first upon the seller to make his demand and having done that, then the buyer was obliged to give the despatching instructions. If the seller fails to make his demand then the buyer is under no obligation to give despatching instructions. The first duty to be discharged is that of the seller to make the demand for the instructions.

On appeal from the judgment and order of Kunhi Raman, J., dated 18th September, 1946, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 2 of 1945 (In the matter of the Indian Arbitration Act X of 1940 and In the matter of the Arbitration case No. 52/41-42 on the file of the Arbitration Tribunal of the Madras Yarn Merchants Association).

A. K. Muthuswami for Appellant.

S. P. Duraiswami for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of an application by the appellant, under section 30, of the Arbitration Act, 1940, to set aside an award of an umpire to whom matters in controversy in an arbitration had been referred, upon disagreement by two arbitrators. The arbitration related to five contracts between the appellant, as seller and the first respondent (hereinafter called the respondent), as buyer, of various quantities of yarn. The arbitrators agreed regarding two contracts of December 1941 *vaida* or delivery. They disagreed with regard to three remaining contracts, which were for January 1942 *vaida*. The arbitrators made two awards (1) with respect to the two contracts upon which they agreed and (2) respecting the three contracts upon which they disagreed. The matters relating to the three contracts, where there had been disagreement, were referred for decision to the umpire who was the second respondent in the application and who is the second respondent in the appeal. Kunhi Raman, J., dismissed the application to set aside the award and, against his decision, the appellant seller has preferred this appeal.

The appellant and the respondents respectively the seller and the buyers under the contracts, carry on business in Madras as dealers in yarns. Each is a member of the Yarn Merchants Association (hereinafter called "the Association"). The objects of the Association include (*a*) to form a code or codes of practice to simplify and facilitate transactions, for which purposes there are bye-laws in its articles or regulations. Article or bye-law 44 provides as follows :

"Notwithstanding anything contained herein, the Committee shall have power only for the purpose of dealing with cases which the Committee in its absolute discretion considers emergent, to alter or supplement any of the bye-laws herein abovementioned."

Article 33 (*c*) of the Association's articles provides that the Committee shall have power

"to make, vary and repeal bye-laws or rules for the regulation of the business of the Association."

The seller and the buyers, when becoming members of the Association, agreed in writing upon the application form for membership, to act in accordance with the rules and regulations of the Association.

The three contracts, with respect to which the arbitrators disagreed and the matters relating to them, which were referred to the umpire, were made on 27th November, and 1st and 5th December, 1944. It was a term in each of those contracts that

"the bye-laws of the Madras Yarn Merchants Association in force now and that may hereafter come into force shall be binding on both the buyers and sellers in regard to the deliveries and payments, etc., of the abovesaid goods."

While the three contracts were current and before the time for performance of them had expired, the executive committee of the Association passed a resolution on 30th December, 1941, called resolution No. 159 the relevant provisions of which are the following :

"(1) In all Indian Mill yarn contracts pending fulfilment in the *vaida* month, each seller shall demand the despatching instructions from his buyer within the 20th of each calendar month, and each buyer shall give despatching instructions to his sellers on or before 24th of each month before 12 noon.

(2) Parties failing to submit their despatching instructions as per clause No. 1 on or before 24th before 12 noon of each *vaida* month, the seller shall complain to the Association and the parties who have not received or tendered the despatching instructions on or before 24th of each month, shall assemble in the Association Hall on the 25th at 3 P.M. . . . . and shall arrange amongst themselves regarding the despatching instructions.

(3) If the buyer fails to give despatching instructions as provided for in clause 1 or 2, the seller shall book the contracted goods to Madras Salt Cottaurs in time on buyer's risk and shall tender the railway receipt as provided for in clause No. 5. If the buyer refuses, fails, evades or neglects to receive such railway receipt, the seller shall claim damages as provided for in clause No. 15 or shall resell the goods on buyer's risk and account at Madras and claim or hand over residuary balances if any."

Paragraphs 4, 5, 6, 7 and 8 deal with methods of delivery being made and means by which that is to be effected.

"9. If any of the contracting parties either fails to deliver the goods or fails to accept them, where deliveries are ex-godowns, or fails to accept R/R or deliver the R/R, where the deliveries are for F. O. R. station, the party who is responsible shall be deemed to have made breach of the contract and the party shall pay damages as provided for in clause No. 15."

Paragraph 15 specifies the method of ascertaining the amount of damages.

It is convenient to make one or two observations regarding the Association and the above resolutions. A perusal of the memorandum and articles of association reflects that all members are traders or dealers in yarn and the substantial object of the association is to facilitate, as far as possible, dealings between the members, to prevent disputes arising out of transactions from progressing into law suits, and, also, in the event of disputes being unsettled, for their decision by arbitration. Each member, as pointed out, agrees to abide by the rules and regulations, and the contracts between members are subject to the provisions for the time being in force relating to the members and their contracts, whether extant at the date of the contract or subsequently arising before performance. In that respect, in my view, all the relevant rules, bye-laws, or whatever they may be called, including those which came into force during the subsistence of a contract, form part of the terms of it. Resolution No. 159 is called "a resolution", but it is clear upon a reference to bye-law 44 and article 33 (c), that upon a resolution being passed it became a bye-law of the Association. Whilst emphasis has been placed upon the word "resolution" and it was argued that that word reflected that its contents were not a bye-law, it must be borne in mind that the committee could not amend, add or vary any bye-law without passing a resolution to that effect. It is clear, in my view, that the resolution in question is a bye-law of the Association and as such its terms form part of the three contracts which were referred to the umpire, by virtue of the provision in the contract itself in that behalf.

The seller did not demand of the buyers despatching instructions, as required by paragraph 1 of resolution No. 159, by the 20th January, the date specified in that paragraph. He did write a letter making a request, but it was not delivered

to the buyers until the 25th of January, which fell on a Sunday in the year 1942. It would seem that the parties did not meet in the Association Hall, which paragraph 2 of the resolution No. 159 suggests. No goods were tendered by the seller either in kind or by way of a railway receipt, he consigned none to or to the order of the buyer by railway and nothing further was done. In the arbitration, he claimed damages for failure by the buyers to give despatching instructions which was tantamount to refusing to accept delivery of the goods.

During the course of the arbitration, the arbitrators stated a case, pursuant to section 13 of the Arbitration Act, for the opinion of this Court upon a point of law. It related to resolution No. 159. Kunhi Raman, J., answered the questions put to him expressing the opinion that, if the arbitrators took the view that the three contracts of January 1941 *vaida* were governed by the terms of the resolution, the seller had committed a breach of the contract by not asking for despatching instructions on or before January 20th, 1941, and the buyer had not committed any breach by failing to give instructions for despatch on or before January, 1924. As abovementioned, the arbitrators published one award in favour of one or other party, upon which they had agreed, in regard to the December *vaida* contracts. They each published a separate award expressing their respective views regarding the other three contracts. These are the matters to which reference was made to the umpire and upon which he published his award. At the time of the umpire's award, he had before him the opinion of this Court on the points of law stated in the case referred to it. The umpire's award is dated 19th October, 1944, in which the following appears :—

"I . . . . . do hereby adjudge and award as follows : I have come to the conclusion that all contracts are governed by the resolutions of the Executive Committee of the association, that the provision contained in clause 1 of resolution No. 159 dated 30th December, 1941, is a very important one, and it is, therefore, a mandatory provision and that non-compliance of this by the seller will amount to a breach of contract. I, therefore, hold that the plaintiff-seller Mr. Penugonda Radhakrishnamurthi by not asking for despatching instructions by the 20th January, 1942, has committed a breach of the contracts."

And, following upon that finding, the umpire disallowed the plaintiff-seller's claim for damages in respect of those three contracts.

In the application before Kunhi Raman, J., and in this appeal, the seller raised three grounds upon which he sought to have the award of the umpire set aside. They are the following :

(1) The umpire was wrong to have taken up the reference with regard to the three January contracts alone, he should have taken cognizance of the whole of the matters of the arbitration, including the other two contracts ;

(2) The umpire erred in holding that the contracts were governed by the bye-laws of the association, and in particular, by the terms of resolution No. 159 ;

(3) Assuming the applicability of resolution No. 159, the umpire was wrong in the construction which he placed upon it and his error is one which is patent on the face of the award.

As pointed out, the learned Judge rejected each of these grounds and dismissed the application.

In regard to the first contention, it was argued that the parties, including the seller, had agreed upon the Tribunal, namely, the two arbitrators, and if they disagreed, the umpire should decide all disputes between them, and that upon disagreement between the arbitrators on one part of the matters in the arbitration, the umpire was bound to take cognizance of the whole of those matters, and it was incorrect and wrong that only the matters upon which the arbitrators disagreed should be referred to him. In support of this argument, reference was made to *Wicks* v. *Cox*[1]. There, it was held that if all or any of the matters in difference between the parties, referred to arbitrators who disagreed, but the disagreement was only as to costs, yet it was required that the umpire must adjudicate on the whole question. That ignores the terms upon which the reference

1. (1847) Q.B. II Jurist 542.

in the present case was made. Those terms are contained in the Association's arbitration bye-laws. Term 27 (*b*) of those bye-laws provides that the arbitrator or arbitrators or umpire shall have power to make an interim award or awards. That provision is identical with that contained in section 27 (1) of the Indian Arbitration Act. In my view, the award which the arbitrators made relating to the subjects upon which they had disagreed, is an interim award as contemplated by the bye-law and by the statute itself. That having been made, then the arbitrators proceeded each to make another award reflecting their differences which required consideration by the umpire. In those circumstances, it was quite unnecessary for the matters upon which the arbitrators had agreed to be referred to the umpire. There bad beeen a decision on those matters, the interim award bad been made, and it could have been filed in Court and a decree passed upon it. The umpire is not an appellate tribunal to sit over the arbitrators; he is a tribunal to whom their differences are referred. There was no difference regarding the two December contracts and the matters relating to them had all merged into the award which the arbitrators made.

On behalf of the seller reference was made to arbitration bye-law No. 25 (*b*) which provides that

> "if any party makes an application to the umpire before he makes his award to hear the case *de novo* the umpire shall do so."

A letter from the seller to the umpire, requesting that the umpire should deal with all matters arising in the arbitration, was put before us; and it was argued that by refusing to go into the matters relating to the two December contracts the umpire acted improperly and misconducted himself as such. Emphasis was placed upon the words "the case" in bye-law 25 (*b*) which it was contended, meant the whole of the matters in the arbitration. In my opinion, that is quite wrong. The words "the case" relate to the matters referred to the arbitrator and to nothing else. The arbitrators acted perfectly properly in the course which they took of publishing an interim award and then their separate awards upon matters upon which they disagreed. The only matters which could be referred to the umpire were those on which the arbitrators differed, the umpire dealt with those matters properly, and there is nothing which justifies interference with his award on the ground that he did not take up all matters which were referred to him.

The next matter for consideration is whether the terms of resolution No. 159 governed or were part of the contracts for January *vaida*. I have already expressed my views upon that matter. Clearly, the resolution was a bye-law which came into force on the day upon which it was passed, December 30, 1941, while the three contracts were still current. By the terms of those contracts that bye-law became a term or terms of the contracts and its provisions were binding upon both the buyer and the seller.

Lastly, the question arises whether the umpire correctly considered the meaning and effect of resolution No. 159. Incidentally his construction conforms with the opinion relating to it which was expressed by Kunhi Raman, J. It is quite clear that, whilst the learned Judge's opinion was given a long time ago, that can be the subject of the present application, since, it would seem no appeal lay at the time against the opinion expressed by the learned Judge when he considered the case stated to him by the arbitrators.

Paragraph 1 of resolution No. 159 requires the seller to demand despatch instructions from the buyer on or before the 20th of the *vaida* or delivery month and the buyer to give despatching instructions to the seller on or before the 24th of that month. When construing a document, a meaning must be given to every word in it, when that course is possible. It is presumed that the draftsman of the document and the person who made it did not use words without some object or include words to which no meaning should be given. Learned counsel for the seller was inclined at one time to suggest that the provision requiring the seller to demand despatching instructions, was one which the seller might or might not observe as he thought fit;

and in any event it was contended that the demand for despatching instructions could be given at a date subsequent to that mentioned in the paragraph, namely, the 20th of the delivery month. That was followed by pointing out that, in fact, the seller in this instance had made such a demand by the 25th, the date when his communication reached the buyers. In construing this paragraph particularly, as well as others in resolution No. 159, it is instructive and helpful to bear in mind the conditions and circumstances which existed. The members of the Yarn Merchants Association, who were parties to this contract, carry on business in Madras; the goods which the seller sells are not always, and indeed but seldom, in Madras. They are with mills or with whole-salers. It is incumbent upon the seller to deliver his goods by the last day of the delivery month, delivery can be made by placing the goods on rail on that day. It is not a question of a seller going to his ware-house or godown on the last day of the delivery month and picking out the goods which he is under obligation to deliver to a particular buyer. The seller must know, sometime before the final date of delivery, the place where his goods are to be sent. It may well be, and probably frequently is, the case that his buyer has, in his turn, sold the goods to some one else. Knowledge of destination of the goods must be in the hands of the seller in good time so as to enable him to make his delivery in accordance with his contractual obligations. It is, in these circumstances, that resolution No. 159 came into force. The contract itself is one to which the principle of time being the essence clearly applied. The clear meaning and effect of paragraph 1 of resolution No. 159, to my mind, is manifest. The buyer must give the despatching instructions by the 24th, provided the seller demands those instructions from him. The obligation is first upon the seller to make his demand, and having done that, as the contract and this particular term provides, then the buyer is obliged to give the despatching instructions. No other meaning can be placed upon the paragraph. If the seller fails to make his demand, then the buyer is under no obligation to give despatching instructions. The first duty to be discharged is that which the seller has undertaken. Emphasis was placed, on behalf of the seller, upon the second paragraph of the resolution which provides for an assembly in the Association Hall on the 25th when despatching instructions have not been received or tendered, so that the parties shall arrange amongst themselves regarding those instructions. It was argued that that paragraph confers a second right upon either the buyer or the seller to make his demand or to supply instructions or to arrange for delivery, and until matters have broken down in discussion in the assembly hall, there is no breach of contract. That argument cannot be accepted. It is clear the object of paragraph 2 is no more than a provision by which the members of the Association, when disputes have arisen regarding instructions for despatch or absence of them, to meet and terminate their disputes there and then. Paragraph 3 was also subject to argument and criticism. At one time, it would appear that the suggestion made was that the seller must either book the goods he contracted to sell to the destination specified or tender a railway receipt or if the buyer refuses or fails to accept the receipt, then to claim damages or to sell the goods. Although the word "shall" appears four times in paragraph 3, it is not in terms of mandatory effect but permissive and optional. The seller, when the buyer is in default, is not compelled to take any course at all with regard either to the goods or the buyer. If he likes, he is entitled to keep them in his ware-house or to step them in transit, or, if he likes, he can sell them against the buyer or claim damages without selling them.

One other matter was argued, and that was an absence of reference in the several paragraphs of resolution No. 159 of any sanction regarding the obligation of the seller to demand delivery instructions. That may be, but it cannot affect the circumstance that the seller is obliged by the clear and unambiguous language of paragraph 1 to demand delivery instructions to be given to him by the date specified.

In my view, the decision which the umpire made, and expressed in his award, was correct. The seller was in default when he failed to observe the obligation

in paragraph 1 of resolution No. 159 to demand delivery instructions from the buyer. Having failed in that respect, it was not incumbent upon the buyer to give despatching instructions, and his failure to do so did not amount to refusal to accept delivery of the goods. He was not in breach of his contractual obligations and was not liable to the seller in damages

For the reasons given, in my opinion, this appeal should be dismissed with costs, Rs. 500 the same amount as allowed before the learned Judge who heard the notice of motion.

Bell, J.—I agree.

B V.V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, MR. JUSTICE RAJAMANNAR AND MR. JUSTICE YAHYA ALI.

In the matter of A Pleader, Madura.*

Legal Practitioners Act (*XVIII of* 1879), *section* 13 (b)—*Pleader giving evidence in a case for the party for whom he was appearing without cancelling the vakalat—Impropriety—Conduct if amounts to professional misconduct within the purview of section* 13 (b) *of the Act.*

Where a pleader even after knowing that he would have to give evidence on behalf of his client continues to act as his pleader in a case and gives evidence without first cancelling the vakalat and even thereafter continues to act in an active capacity as his counsel, his conduct is improper and in no circumstances can it be considered that it was anything other than deserving of condemnation. The pleader should have cancelled his vakalat and ceased his professional connection with the case immediately be became aware that his evidence was essential and that he would have to be a witness at the trial.

Obiter dictum in In the matter of *Venkatachariar and Sivaramakrishna Dikshitar*, (1942) 2 M.L.J. 479 (F.B.), approved.

As there is no authority or rule which prohibits such conduct there is a doubt whether it can be said to be professional misconduct within the purview of section 13 (*b*) of the Legal Practitioners Act and the doubt has to be exercised in favour of the pleader.

Necessity for the Madras Bar Council to frame rules in the matter pointed out.

The Advocate-General (*K. Rajah Aiyar*) for the Crown.

R. Gopalaswami Aiyangar for the Pleader.

Petitioner (Complainant) appearing in person.

The Judgment of the Court was delivered by

The Chief Justice.—This case comes before the Court under section 15 of the Legal Practitioners Act upon the finding expressed by the learned District Judge of Madura after holding an inquiry into a complaint against a pleader of professional misconduct. The relevant provisions of that Act are found in section 13 which provides as follows :

"The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid—

* * * * *

(*b*) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty."

The pleader was engaged by clients to propound a will as the last testament of a deceased person. He filed a vakalat, together with the necessary papers and documents seeking grant of probate. In regard to the will the pleader was not an attesting witness, but, according to his own statement contained in his counter-affidavit affirmed on 28th July, 1947, he had drafted the will and was present at the time it was executed by the testatrix and signed by several attesting witnesses.

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* Referred Case No. 57 of 1947. 15th December, 1947.

A caveat was entered and, after the proceedings were treated as a testamentary suit, a written statement was filed by the caveator which alleged that the will was not executed or was not executed in due form and that the person propounding it, together with those who prepared it, were conspiring together to obtain, improperly, a grant of probate of an instrument which purported to dispose of her property. It was clearly manifested, when the written statement had been filed and had been received by the pleader, that he was a necessary and essential witness of execution. Of that there is no doubt. In paragraph 5 of his affidavit he states as follows :

> " As desired by the testatrix, I was also present when the will was duly executed by the testatrix and attested by witnesses. So that my evidence besides being relevant was absolutely necessary in a contested case especially."

He knew, therefore, prior to the hearing or trial of the testamentary suit, that he was a necessary witness and, as he describes it, one who was absolutely necessary ; he clearly realised that he would be called as a witness in support of the parties propounding the will.

The pleader did not cancel his vakalat. He continued, together with another pleader who was his senior, to act as counsel on behalf of the propounders of the will and he appeared at the trial, together with the other pleader, as counsel. When the time arrived for him to do so, the pleader left his position in Court at the seat reserved for counsel, entered the witness box, gave evidence of due execution and, thereafter, immediately returned and assumed his position and place as counsel. Indeed, in regard to one witness, at least, subsequently called by the other party, the pleader cross-examined that witness.

In paragraph 6 of his affidavit the pleader states that he did not conduct the trial ; it was in the complete charge of Mr. R. V. Srinivasa Iyer. Later, he states, that in effect he had practically retired from the suit. The paragraph concludes, that he was advised that " there is no invariable rule that a lawyer appearing in the case can give evidence only after he withdraws his vakalat." In the argument before us, learned counsel, appearing on behalf of the pleader, sought to place some reliance upon the submission that, since other counsel was engaged who was in charge, the circumstances were different to what they would have been had the pleader appeared alone on behalf of his clients, for whom he gave evidence. That argument cannot be accepted, and, unhesitatingly, is rejected.

It was contended on behalf of the pleader that, whilst his conduct was improper inasmuch as the pleader should have cancelled his vakalat before he gave evidence, nevertheless there is no moral turpitude in the course which the pleader followed. It was added, in that connection, that the omission to cancel the vakalat was simply in the nature of oversight and, to adopt the words of the learned counsel, it never struck the pleader that he should have cancelled the vakalat before he turned himself into a witness.

In the present instance, the necessity for the pleader to give evidence did not arise out of some unexpected course which the trial took and which was not apparent previously. Here, clearly, the pleader was fully aware, as he himself says in his affidavit, before the trial that he was an essential and necessary witness. Nevertheless, he continued as counsel right to the end of the trial and the judgment interrupted only by a temporary cessation of acting in his professional capacity while he was testifying in the witness box. It is beyond doubt that the pleader should have cancelled his vakalat and ceased his professional connection with the case immediately he had perused the written statement and was then aware that his evidence was essential and that he would have to be a witness at the trial. His conduct in giving evidence without cancelling the vakalat and continuing to act in an active capacity as counsel was improper.

The question which arises in the present instance is whether that conduct amounts to professional misconduct, that is to say, whether it comes within the words in clause (*b*) of section 13 of the Legal Practitioners Act and was grossly improper conduct in the discharge of his professional duty.

In *In the matter of Venkatachariar and Sivaramakrishna Deekshitar*[1], it was observed in the course of the judgment of the Full Bench delivered by Sir Lionel Leach, C.J., that,

> "A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity."

There, the charges of professional misconduct which were being considered, did not include one of the like which is now before us. The charges related to other matters but it emerged during the course of the proceedings that the pleader had given evidence on behalf of his client without having terminated or cancelled his vakalat, and the observations, to which reference has been made are clearly by way of obiter dictum. Nevertheless, if I may respectfully say so, I agree entirely with what was said there.

A number of authorities have been cited, but in none has the question arisen whether the circumstances which arise in the present instance, amount to professional misconduct. In most of the cited cases the point which required decision was whether a witness was incompetent to give evidence by reason of his position as counsel and whether any attention ought to be paid to the evidence given. In all the authorities, the finding is that the evidence was admissible and the witness, in spite of his professional connection with the case, was not an incompetent one.

In *Mannargan* v. *Emperor*[2], counsel appearing for an accused in a criminal prosecution was cited as a witness for the Crown. Thereupon, immediately he disengaged himself as counsel for the accused. His conduct in doing that was criticised but was held to have been perfectly correct. There were observations made, that, when such circumstances arose, sufficient notice should be given to the accused to enable him properly to be represented when the advocate, previously appearing for him, was becoming a Crown witness and had to retire from the case. Many of the decisions describe the conduct, of which complaint is made here, as undesirable.

The Bar Council of Patna and the Bar Council of Allahabad have made rules regarding the matter now under consideration. Doubtless those rules were made in consequence of the observations, in the several authorities, that the conduct of a practitioner in giving evidence on behalf of his client, without terminating his vakalat, is undesirable. The general effect of the rules, made by the two Bar Councils mentioned above, is that no advocate should accept a retainer if he knows, or has reason to believe, that he is likely to be a witness other than a purely formal witness or that his own conduct is likely to be attacked in the proceeding and that, if an advocate does accept a brief or retainer in such proceedings and subsequently it comes to his knowledge that he will be, or is likely to be, a witness, he should immediately retire from the case.

There is no such rule contained in the rules of the Bar Council of Madras. Unquestionably the conduct of the pleader was improper and is deserving of condemnation. It is not sufficient for him to say, in answer to the charge made against him, that it escaped his notice there was necessity for him to have cancelled his vakalat and to have retired from the case. The learned District Judge expressed a finding that the pleader was more guilty of an error in the proper exercise of his discretion in not withdrawing his vakalat before he gave his evidence rather than that he was guilty of any act of professional misconduct. I am unable to subscribe fully to the reasons which the learned District Judge has given.

As mentioned previously, the question which requires decision now is whether the pleader's improper conduct amounted to professional misconduct so as to come within the purview of clause (*b*) of section 13 of the Act. In the absence of any authority and in the absence of any rule corresponding to those which form part

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1. (1942) 2 M.L.J. 479 (F.B.). 2. (1925) 49 M.L.J. 95

of the rules of the Patna and Allahabad Bar Councils, it seems to me that there is a doubt whether the Act is one which can be said to come within the provisions of clause (*b*) of section 13 and, if it does not, whether the pleader's conduct is such that it justifies this Court suspending or dismissing the pleader or indeed, finding him guilty of conduct justifying dismissal or suspension. Since there is that doubt, it must be exercised in the pleader's favour and for that reason the finding by the learned District Judge will be accepted.

I wish however to make it perfectly clear that the conduct, of which the pleader was guilty in this case was, as I have already stated, improper and in no circumstances can it be considered that it was anything other than deserving of condemnation.

I desire to express one further observation. It is to suggest that the members of the Bar Council of Madras should, at the earliest possible date, give consideration to the desirability and possible necessity for making a rule, which corresponds to the rules which the Bar Councils of Patna and Allahabad have framed. It is appreciated of course that any rule which the Bar Council may make will have application to advocates alone and not to pleaders.

Rajamannar, J.—I agree entirely.

Yahya Ali, J.—I too agree.

V. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, AND MR. JUSTICE BELL.

R. M.N.N. Nagappa Chettiar .. *Appellant**.

v.

Messrs. Trojan and Company, Madras .. *Respondents.*

Limitation Act (IX of 1908), *Articles* 23, 36 *and* 120—*Suit for damages for maliciously presenting a petition in insolvency against the plaintiff resulting in his adjudication—Limitation—Starting point.*

On a petition filed by the defendant on 22nd September, 1937, when already there was pending another petition by another creditor, the plaintiff was adjudicated insolvent on 5th October, 1937, and the two petitioning creditors were given their costs, both petitions being heard together. At that time the plaintiff believed that he was indebted to the defendant in respect of share transactions. When the Official Assignee investigated the affairs the claim of the defendant was found to be the result of a fraud played on the plaintiff by the defendant, and the claim was therefore denied. Ultimately the claim was tried as a suit which was unsuccessful. That decision was affirmed on appeal and leave to appeal to the Privy Council having been refused the defendant ultimately applied in London for special leave which was also refused. It was not until somewhere about the 19th November 1943, when the result of the defendant's application to the Board was received in Madras that the plaintiff knew finally that he was not indebted to the defendant in respect of the transactions. On 24th January, 1944, the plaintiff filed an application for annulment of his insolvency and on 22nd February, 1944, the order of annulment was made after notice to the defendant. Then the plaintiff filed his suit on 21st February, 1945, against the defendant for damages for maliciously and without reasonable and probable cause presenting the petition in insolvency against him, as the result of which he was adjudicated insolvent. On a question of limitation,

Held, Article 23 of the Limitation Act is inappropriate as the word " prosecution " there relates to a case where the criminal law is set in motion. Article 36 would be more appropriate and prescribes two years as the period of limitation. It cannot be said that that period commences from the date of the filing of the petition. Before a cause of action can arise in respect of an order of a competent Court the order must have been set aside. In the present case until the Privy Council rejected the defendant's application for special leave to appeal, the plaintiff could not have applied for annulment of the insolvency. Even if Article 36 could be deemed inappropriate there is always available Article 120 which provides for a period of six years which would amply cover the plaintiff's case. The suit was accordingly in time.

On appeal from the decree and judgment of the Hon'ble Mr. Justice Kunhi Raman, dated the 21st day of March, 1946, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 54 of 1945.

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*O.S.A. No. 23 of 1946. 1st December, 1947.

K. Krishnaswami Aiyangar, N. Suryanarayana and *K. Parasurama Aiyar* for Appellant.

M. Murugappa Chettiar for Respondent.

The Court delivered the following

Judgment: *Bell, J.*—In this appeal the appellant, who was the plaintiff in the suit, sought to recover damages on the ground that the defendants had maliciously and without reasonable and probable cause presented a petition in insolvency against him, as the result of which on 5th October, 1937, he was adjudicated insolvent. He says he was not able to obtain annulment of his adjudication until 21st February, 1944. Kunhi Raman, J., dismissed the suit holding in the first place that it was barred by limitation. He came also to the conclusion that want of reasonable and probable cause had not been satisfactorily proved. Even so he held that there was no evidence of malice and finally was of the opinion that the plaintiff on the evidence was entitled to no more than nominal damages.

The plaintiff has been pressed before us as a well-to-do man of the Chettiar community and of good character and reputation. It is stated that in a partition somewhere about 1933 between himself and his brothers he received as his share more than two lakhs of rupees. He took up residence in Madras and began speculating on the stock exchange. As he himself said in the course of the insolvency proceedings, his transactions were extravagant in the extreme and were in fact no more than rash speculations in differences. In the course of these transactions he became concerned with two firms of stock-brokers, one called Ramlal and Company and the other Trojan and Company, the present respondents who are a registered firm still carrying on business in Second Line Beach, George Town, Madras. The sole proprietor of the firm today is one Annamalai Chettiar.

In April, 1937, there was something approaching a crisis on the Calcutta Stock Exchange in relation to certain shares in which there had been much heavy gambling. Trojan and Company, it has been proved beyond doubt, received private information from Calcutta, as the result of which they determined to get rid of their own holdings in those particular shares before the anticipated slump in them actually took place. To this end they fraudulently induced the plaintiff to buy 5000 Indian Iron shares pretending that they had purchased them in the normal way on the market. In fact, 1,800 of these shares belonged to Annamalai Chettiar, 1,000 to his wife and 1,000 to a firm of which Annamalai Chettiar and Company were managing agents. The rest of the shares belonged to persons who were close friends of Annamalai Chettiar. Trojan and Company charged the usual commission to the appellant. The above transaction which took place on 5th April, 1937, has been considered several times in this Court and a number of Judges have held, without hesitation, that Trojan and Company acted most unscrupulously and in gross fraud of the appellant who was their client and who acted on their advice.

The shares ultimately and inevitably dropped seriously in price and the appellant's accounts with Trojan and Company showed as the result a debt against him to the extent of over a lakh of rupees. The appellant paid off some Rs. 60,000 leaving apparently due a balance of Rs. 51,712-7-0. Trojan and Company pressed him for payment and on 22nd May, 1937, he executed a promissory note in their favour, acting under the full belief that the transaction was perfectly above board. Trojan and Company then filed C. S. No. 151 of 1937 in the High Court in order to realise the amount alleged to be due as quickly as possible. They obtained an interim order of attachment before judgment on the appellant's moveable and immoveable properties.

His transactions with the other firm also resulted in a heavy loss and with the pressure put on him to clear off his liabilities and believing that he was hopelessly involved financially, he foolishly attempted to alienate some of his properties, in particular a house in Madras which was then in process of building, to his wife

and others. . The other firm of brokers heard about the respondents' attachment and of these alienations and on 3rd September, 1937, they presented a petition in insolvency (I.P. No. 305 of 1937). The usual consequences followed and the Official Assignee was appointed interim receiver of the appellant's properties.

Fearing lest the appellant should effect some compromise with the other firm, Trojan and Company on 22nd September, 1937, took it upon themselves to file another insolvency petition (I.P. No. 345 of 1937) against him. In the petition they asked for leave to present and prosecute the petition in case the other petitioning creditors Ramlal and Company "do not proceed with due diligence with their petition." They went on to say, ". . . . . . . the debtor has been trying to compromise with Messrs. Ramlal and Company and as any such arrangement may affect prejudicially other creditors, the present petition is filed. . . . ." Out of the filing of this petition, the present proceedings have arisen.

On 5th October, 1937, the appellant was adjudicated insolvent and the Insolvency Judge, Wadsworth, J , mentioned in his judgment that in fact the appellant submitted to being adjudicated. The two petitioning creditors were given their costs. A similar order on the second petition was asked for at the same time, both the petitions being heard together.

At this time the insolvent believed that he was legally indebted to these firms of stockbrokers. When the Official Assignee, however, came to investigate his affairs, the true history and nature of the transaction with Trojan and Company came to light and their claim to rank as creditors was ultimately denied. Their claim after rejection by the Official Assignee was ordered to be tried as a suit in the insolvency jurisdiction and Somayya, J., dismissed it, holding that they had been guilty of a shocking and gross fraud. On appeal to a Bench, the late Chief Justice and Lakshmana Rao, J., came unhesitatingly to the same conclusion. Trojan and Company then asked for leave to appeal to the Privy Council. This was rejected. Ultimately in London they asked for special leave to appeal which was refused by the Board. All these proceedings had taken considerable time and it was not until somewhere about the 19th November, 1943, when the result of the respondent's application to the Board was received in Madras that the appellant knew finally that he was not indebted in respect of these transactions to Trojan and Company. On 24th January, 1944, he filed an application for annulment of his insolvency and on 21st February, 1944, the order of annulment was made after notice to the respondents. The application would unquestionably have been premature had it been made before the last mentioned proceedings of the respondents had come to an end.

The appellant's case is shortly as follows, and it is supported by the evidence of Annamalai Chettiar himself. When Trojan and Company filed I.P. No. 345 of 1937 they knew that the debt alleged by them against him was not true and that they had no justification whatever for the proceedings. In cross-examination Annamalai Chettiar admitted that if after receiving secret information from Calcutta and without disclosing the same to the appellant, he had sold the shares to him his conduct would have been improper and that the transaction would not have been binding on the appellant, Apart from the claims of these stockbrokers the appellant's just debts were comparatively small and his possessions ample to meet them if and when called upon to do so. He says that the respondents' action was designed only to ruin him and to cover up and hide their own fraud.

Before Kunhi Raman, J., and before us it has been contended that the present suit, which was filed on 21st February, 1945, was out of time because if the suit be an action for malicious prosecution, the wrong done occurred on 22nd September, 1937, when the respondents' petition was filed. Article 23 of the Limitation Act provides that proceedings for malicious prosecution must be started within one year from the time when the prosecution is commenced. The learned Judge held and I agree with him that Article 23 is inappropriate, because therein the word 'prose-

cution' relates to a case where the criminal law is set in motion. In support of a contention that the word 'prosecution' can cover not only prosecutions in criminal matters but also in cases such as the present one, Mr. Krishnaswami Ayyangar for the appellant has cited several cases including *Mohamed Amin* v. *Jogendra Kumar Bannerjee*[1], where their Lordships, after referring to the fact that the action for damages for malicious prosecution is part of the Common law in England and that the foundation of the action lies in abuse of the process of the Court by wrongfully setting the law in motion, go on to say :

> "That the word 'prosecution' in the title of the action is not used in the technical sense which it bears in Criminal Law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company."

It is, however, the use of the word in the Indian Limitation Act which has to be considered and it is beyond doubt that Article 23 refers only to criminal proceedings. Article 36 would appear to be more appropriate and this prescribes two years as the period of limitation for claiming compensation "for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specifically provided for." The time when the limitation will start is, "when the malfeasance, misfeasance or nonfeasance takes place." Even so, it is argued for the respondents that the two years' period must run from the date of the filing of the petition when the Act of malfeasance or misfeasance, of which the complaint is made, took place. This contention cannot be accepted. It is a well-known and well-settled principle of law that before a cause of action can arise in respect of an order of a competent Court, the order must have been set aside : *Metropolitan Bank* v. *Pooley*[2]. In the present case no proceeding to set aside the order of adjudication could have been undertaken by the appellant until it was finally ascertained that Trojan and Company could no longer contend before any Court that they had any right to file an insolvency petition. As stated this was not until the news was received that the Privy Council had rejected their application for leave to appeal from the order of this High Court rejecting their claim. Limitation starts when it is possible to bring a suit or other proceeding at law. It was observed in *Western India Oil Distributing Company, Limited* v. *Rathnasabapathy*[3] dealing with Article 145 of the Limitation Act :

> "The cause of action and the right to sue first arose when the business between the parties ceased . . . ."

The Court then referred with approval to *Ram Ranbijay Prasad Singh* v. *Mt. Bachia Kuari*[4] where it was said, "The Limitation Act provides for time running only after the cause of action has arisen." The plea of limitation put forward on behalf of the respondents must therefore fail because the suit was brought one year after the order of annulment. Even if Article 36 could be deemed inappropriate there is always available the residuary Article 120 which provides for a period of six years. This would amply cover the case of the appellant.

On the question whether Trojan and Company's petition was filed without reasonable and probable cause and with malice there is no doubt whatever. As already indicated, Annamalai Chetti, the head of the defendants' firm, admitted that at the time when the petition was filed he knew only of the debt alleged by Ramlal and Company and of his own. He did not know that there were any other creditors until the Official Assignee subsequently made a list. He was forced to admit that from his knowledge of the appellant the latter could easily have discharged his just debts, which in any event amounted to no more than a sum of Rs. 12,000. He admitted that it was only because he felt that Ramlal and Company might settle their claim that he filed his petition and that he did it so as to make certain that there would be an adjudication. In fact, Ramlal and Co.'s debt was subsequently disposed of. Kunhi Raman, J., felt some doubt whether there was

1. (1947) 2 M.L.J. 27 : L.R. 74 I.A. 193 (P.C.).
2. (1885) 10 A.C. 210.
3. (1947) 1 M.L.J. 360 at page 363.
4. A.I.R. 1939 Pat. 688.

want of reasonable and probable cause being evidently under the impression that the petitioners had acted on legal advice. Trojan and Company however never pleaded in their written statement that they had acted under legal guidance and there was no issue on the point. The assertion was made by Annamalai Chettiar only in cross-examination and his evidence in this connection is vague to a degree, without support and entirely unacceptable He stated that he had instructed and consulted various lawyers privately but produced nothing in writing, and there was no witness, to support his story. He had to admit that at all events he had never told the lawyers who appeared for him and who appear for him to-day anything about his consultations and instructions to other lawyers prior to the filing of the insolvency petition. In all the circumstances there can be no doubt that there was a complete lack of reasonable and probable cause for filing the petition, nor can there be any doubt that Trojan and Company, knowing what they did know about the share transactions, knew that they had been fraudulent and that the appellant was not justly indebted to them. Not content with allowing Ramlal's petition already filed, to go on by itself, they filed a petition of their own so as to ensure that the appellant whom they knew they had so wickedly deceived should not excape adjudication as an insolvent. In doing so, on the evidence which has been read before us with care, they were plainly guilty of malice also. When a person knows that there is no just debt due to him without which he cannot file a petition in insolvency and yet files such a petition based upon a false debt, the ingredients of malice are clearly present. In the present case, one K. Bhairavan the authorized agent of Trojan and Company verified the petition by stating, *inter alia*, ". . . . .the facts stated . . . . . .are true to my knowledge. . . . . "

The next question for consideration is that of damages. The plaintiff claimed in all a total of Rs. 1,80,000 under 8 different heads, of this amount Rs. 80,000 was waived. The amount is grossly and indeed hopelessly exaggerated. Mr. Krishnaswami Aiyangar has wisely abandoned most of the claims leaving three only to be considered, namely, (*a*), (*c*) and (*g*). With regard to (*a*) which is alleged to be the loss sustained by the sale by the Official Assignee of a house which the appellant was building in Madras and in respect of which the appellant claims Rs. 30,000, it appears to be clear that the claim is unsustainable. There is some suggestion that under Hindu law or custom the appellant was bound to provide for his wife and therefore in some way was bound to build this house for her. This was the story which was put forward at the time when the sale deed executed by him in favour of his wife in July, 1937, was being examined. The Court held that the purported sale was false, in any event was without consideration and was an attempt to defeat his creditors. It was thererfore set aside and the property reverted to the estate. There can be no doubt that the appellant did try to defeat his creditors thinking of course that they were more numerous and for greater amounts than they proved to be subsequently. His case throughout was that the property belonged to his wife as the result of the conveyance he made to her. Alienations by owners of property can always be made but they are subject to Insolvency Law and if made within the statutory period are always liable to be set aside at the instigation of the Official Assignee and for statutory reasons, one of which is an attempt to defeat or delay creditors. The appellant tried without any evidence of substance to suggest that if he had been allowed to finish the house it would have been worth on the date of the annulment very much more than its original cost and that thereby a loss has been occasioned. Even if true, however, the loss is not his loss but that of his wife.

With regard to head (c) the appellant says that in the course of the administration of his estate in insolvency a number of insurance policies, of which he had paid the premia for at least four years in some cases, were surrendered by the Official Assignee and thereby the appellant had lost the use and benefit of the money which he paid as premia. It is conceded that he had paid in premia Rs. 7,160. The total surrender value was Rs. 1,963 and his loss was therefore Rs. 5,197. For this

he is clearly entitled to compensation and is therefore awarded Rs. 5,197 under this head.

The last head, *viz.*, (*g*) relates to "damage due to loss of reputation, physical pain, mental suffering and inability to engage himself profitably in any business due to the adjudication in insolvency". The appellant claims Rs. 20,000. He is clearly entitled under the law to general damages and the question is only as to the quantum. Normally the filing of a petition in bankruptcy must damage any trader's credit and reputation. The appellant, it is conceded indeed, was described by the respondents as a banker. He was or had been possessed of considerable properties although given to rash and hazardous speculation. It must be noted however that he was also a man who was prepared to go to any length to deceive and defeat his creditors and that his truthfulness has not survived the test of cross-examination. For no very apparent reason he was cross-examined about a minor criminal prosecution in which he had been involved and which under no circumstances could have been deemed very harmful to his normal character. When questioned he had no scruple in denying any knowledge of the matter and persisted in doing so, although plainly he was not telling the truth. He has given no evidence about loss of reputation or about the physical pain which he alleges he suffered as a result of being made an insolvent and there is no evidence to show that he was unable to earn his living by reason of his adjudication. He was, however, publicly held to be an insolvent for nearly seven years. In all the circumstances a fair sum by way of compensation would be Rs. 3,500 and this he is awarded.

The appellant therefore succeeds in this appeal and the decision of Kunhi Raman, J., is set aside. The appellant in all will recover a sum of Rs. 8,697 with all his costs here and in the Court below.

The Chief Justice.—I agree.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

United Brokers .. *Appellants**

v.

Alagappa Corporation by sole proprietor Dr. Sir RM. Alagappa Chettiar .. *Respondents.*

Contract—Breach—Sale of shares between stockbrokers—Failure to deliver shares—Suit by buyer for specific performance or for damages—Relationship between parties whether one of employment—Measure of damages.

The defendants, who were stock and sharebrokers, sold and agreed to deliver to the plaintiffs certain quantity of named shares. As there was default in delivering the said shares the plaintiffs sued to enforce specific performance of the agreement and in the alternative for damages, which was estimated as the difference between the value of the shares on the date of the sale and the value thereof on the date of the institution of the suit. The defendants contended that the relationship between the parties was one of employment, that either both the plaintiffs and the defendants were agents, or in the alternative that the plaintiffs were the agents of the defendants. The contracts that passed between the parties recited "we have this day done by your order and on your account" and they did not purport to have been entered into on behalf of principals, disclosed or undisclosed. The correspondence between the parties showed that they did not act as brokers for others. On the question of damages the defendants contended that the appropriate date would be the date of the trial when the plaintiffs declared their intention to abandon the relief of specific performance and claimed damages.

Held, that the transactions between the parties should be deemed to be one of sale and purchase and that the relationship between them was not one of employment.

Patiram Banerjee v. *Kanknarrah Co., Ltd.,* (1915) I.L.R. 42 Cal. 1050 and *Nanda Lal Roy* v. *Gurupada Haldar,* (1924) I.L.R. 51 Cal. 588, distinguished.

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*O.S.A. No. 27 of 1947. 2nd December, 1947.

Held, further, that the plaintiffs were entitled to the damages based upon the difference between the rates at which the shares had been sold to them and the rate prevailing on the date of the plaint.

Decision of Chandrasekhara Iyer, J., in *Alagappa Corporation* v. *United Brokers*, (1947) 2 M.L.J. 260, affirmed.

Appeal preferred against the judgment and decree of the Hon'ble Mr. Justice Chandrasekhara Aiyar, dated the 14th day of February, 1947 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 156 of 1946.

R. Narasimhachariar for Appellants.

B. V. Viswanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENTS : *Rajamannar, J.*—This appeal arises out of a suit brought by the respondents to compel the appellants to specifically perform certain agreements to deliver in all 700 shares of Steel Corporation of Bengal, Limited, or in the alternative to recover from the appellants a sum of Rs. 13,506-4-0 being the estimated damages on account of the appellants' failure to perform the contracts entered into by them. There was also a claim for a sum of Rs. 612-8-0, the dividend which had accrued on the shares ; but this claim was disallowed and the plaintiffs have not chosen to appeal against the disallowance. There is also no dispute in regard to another sum of Rs. 484-6-0 claimed by the respondents from the appellants.

In May 1945 the defendants who were carrying on business as stock and share-brokers sold and agreed to deliver to the respondents described as Alagappa Corporation by its sole proprietor, Dr. Sir RM. Alagappa Chettiar in all 700 shares of the Steel Corporation of Bengal, Limited, at rates varying from Rs. 31-11-0 to Rs. 33-1-6 per share. In spite of repeated demands the defendants failed to deliver the shares and after a final demand the suit was instituted on the 26th April, 1946 for specific performance or in the alternative for damges. Besides a technical plea in regard to the frame of the plaint and description of the plaintiffs, the main plea in defence was that the transactions between the plaintiffs and the defendants were not of purchases or sales, but on the contrary the plaintiffs and the defendants were acting as brokers and were intermediaries in putting through and bringing about contracts between other parties. Alternatively the appellants pleaded that the plaintiffs were acting as agents for the defendants who in turn were acting as agents for other parties. The relationship between the parties was according to the appellants one of employment and not of vendors and purchasers.

At the commencement of the trial the plaintiffs abandoned the relief of specific performance and elected to proceed with the suit only in respect of the relief of recovery of damages. The learned Judge who tried the case held that there were no merits in the main plea taken by the appellants in defence. He held that the contracts of sale were entered into by the parties as principals and not as brokers or agents. As the defendants committed default in delivering the shares the learned Judge held that the plaintiffs were entitled to damages which he assessed in the difference between the rate obtaining in the market on the date of the institution of the suit and the contract rate. In the result he passed a decree in favour of the plaintiffs for the sum of Rs. 13,990-10-0 and also granted the plaintiffs their costs of the suit. The defendants appeal.

The learned advocate for the appellants attempted at the outset to raise a point which according to him would disentitle the plaintiffs from obtaining any relief whatever in the suit. He contended that when the plaintiffs chose to abandon the relief of specific performance, it amounted to a declaration that they were not ready and willing to perform their part of the contract and they were therefore not entitled to claim even damages on that footing. It is clear from the Judgment that the point was not taken before the learned Judge in the way in which it has been attempted to be raised before us. In the grounds of appeal the only ground which according to the appellants' advocate raises this point is ground No. 11. That reads as follows :—

"The learned Judge ought to have held that in the event of the plaintiff not being entitled to a decree for specific performance no damages could be awarded."

I do not think that the language of this ground can be held to cover the point now sought to be raised. I do not think it either just or proper that the appellants should be permitted to raise an objection which goes to the root of the plaintiffs case at this stage in appeal. As we have not permitted, the appellants' advocate to raise the point, it is unnecessary to deal with the decision of the Judicial Committee in *Ardeshire Mama* v. *Flora Sassoon* [1], cited by him in support of his contention.

It was again contended here, as it was contended in the Court below, on behalf of the appellants that the relationship between the parties was one of employment, that either both the plaintiffs and defendants were agents or in the alternative that the plaintiffs were the agents of the defendants. The form of the contracts, the correspondence between the parties and the admissions of the defendants completely negative this contention of the appellants. The contracts of which Exhibit P-1 is an example purport to be sales by order and on account of the plaintiffs. There is also corresponding bought-notes which show the defendants as sellers. The contracts do not purport to have been entered into by the defendants acting as agents on behalf of principles disclosed or undisclosed. The words are "We have this day done by your order and on your account." The correspondence between the parties conclusively demonstrates the way in which both the parties treated the transactions. It is sufficient to refer to two letters of the defendants; one addressed to the advocate of the plaintiffs, dated the 12th November, 1945, in which they say as follows:—

"We are in receipt of your letter of the 9th instant in respect of 700 Steel Corporations due from us to Messrs. Alagappa Corporation. We have not yet received the relative documents from our sellers and we shall complete delivery of the same immediately we receive the same from our sellers."

And the other, dated the 2nd January, 1946, in which the defendants say,

"We shall deliver to you the 700 Bengal Steels at the original sale rates immediately the documents for the 700 Steel Corporations are received by us from our sellers."

A partner of the defendants' firm was in the box and he was asked by the learned Judge whether he did not look to the plaintiffs for payment for the shares sold by the defendants. The answer was "yes". The learned Judge pursued the matter by asking again "Not to any buyer from him?" and the answer was "No". The witness also admitted that in the contracts it was not stated that the defendants acted as brokers for others. Having regard to these circumstances I have no hesitation in holding that the transactions between the parties must be deemed to be one of sale and purchase and it is impossible to hold that the relationship between the parties was one of employment. No assistance can be derived from *Patiram Banerjee* v. *Kanknarrah Co., Ltd.* [2] and *Nanda Lal Roy* v. *Gurupada Haldar* [3], cited to us by the learned advocate for the appellants because in those cases it was evident on the face of the contracts that they were entered into on behalf of principals.

The next question is the measure of damages to which the plaintiffs would be entitled. The learned Judge has accepted the plaintiffs' claim which was based upon the difference between the rates at which the shares were sold and the market rate prevailing on the date of the plaint. It was contended on behalf of the appellants that the market rate prevailing on the date of the plaint would not be material. It was suggested on behalf of the appellants that the appropriate date would be the date of trial when the plaintiffs declared their intention to abandon their relief of specific performance. I cannot agree that on principle the date of breach can be postponed to the date of trial. It is clear from the plaint that the plaintiffs elected to claim damages on the footing that damage was suffered on the date of the plaint by which date the defendants had failed to deliver the shares. It is

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1. (1928) 55 M.L.J. 523 : L.R. 55 I.A. 360 : I.L.R. 52 Bom. 597(P.C.).
2. (1915) I.L.R. 42 Cal. 1050.
3. (1924) I.L.R. 51 Cal. 588.

true that the plaintiffs were claiming specific performance but before the date of suit the defendants had not agreed to comply with this demand. Looking at the matter from another point of view, assuming that the trial had proceeded on the question of specific performance and the Court had found that though the defendants had defaulted, it was not a case in which specific performance could be decreed, it would even then be open to the Court to award compensation or damages to the plaintiffs. In that case the damages would have been calculated as on the date of the institution of the suit. No authority has been cited to us to show that the date adopted by the plaintiffs and accepted by the Court, namely, the date of plaint, was not the proper date for calculation of damages suffered by the plaintiffs.'

The appellants complain that costs should not have been awarded against them on the full amount of the plaint claim which was on the basis of the market value of the 700 shares amounting to Rs. 37,496-14-0. When the plaintiffs abandoned the claim for specific performance, there could be no justification for awarding costs to them on an amount which represents the market value of the shares. The proper order will be to award the plaintiffs costs on the amount decreed to them.

Except as regards the costs the appellants have failed in the appeal on the other points. The appellants are therefore directed to pay to the respondents three-fourths of the costs of this appeal.

The Chief Justice.—I agree and wish to add a few words relating to the contention, which learned counsel for the appellants wished to make, and which was refused. In my view, ground No. 11 of the appeal in no way seeks to raise the point which learned counsel desired to argue. If it had been intended, in the grounds of appeal, to rely upon a contention that on the abandonment of the claim for specific performance the right to claim damages would be forfeited, it would have been, and could be, clearly and expressly so stated. It has not been even referred to, and the word "abandonment" does not appear in any ground of appeal. It is clear that that point was never raised before the learned Judge; that is manifest from his judgment.

In regard to the question of costs, whilst it is correct to say that the appellants should not be made to pay costs except with reference to matters where the respondent has succeeded, in my view they should not be paid any costs of appeal by the successful party inasmuch as, from the judgment it is manifest that the question of proportionate costs was not raised before the learned trial Judge.

B.V.V. *Decree modified.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.[1])

PRESENT:—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

K. Kochunni *alias* Muppil Nayar ... *Appellant**

v.

K. Kuttanunni *alias* Elaya Nayar and others ... *Respondents.*

Malabar law—Sthanam—*Position and rights of* Sthani *and nature and incidents of* Sthanam *property*—*Re-grant of the administration to chieftains by the East India Company*—*Effect of*—*Levying of land revenue on the estate of the* Sthani *and deprivation of the ruling powers of the* Sthani—*If alters character of the property*—*Acts of Court of Wards, if can alter original incidents of the property*—*Decrees for maintenance against* Sthani, *if inconsistent with the* Sthanam *character of the property*—Sthanis *making no conscious distinction between their position as* Karnavan *and* Sthani—*If alters the legal character of the property.*

In a suit for a declaration that the properties in the possession of the defendant, the Muppil Nair of Kavalappara estate, were *Tarwad* or joint family properties belonging to the joint family consisting

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* P.C. Appeal No. 84 of 1944. 29th July, 1947.

1. (1944) 1 M.L.J. 272.

of the defendants and the plaintiffs, the defendant denied the claim and asserted that the properties appertained to his *Sthanam* and belonged to him exclusively as the *Sthanam* owner thereof. It was found by both the trial and the High Court that before 1792 when Malabar came to be ceded to the East India Company by Tippu Sultan, the ruler of Mysore, the then ruler of Kavalappara was an independent chieftain in his own right, exercising ruling powers, and had lands attached to his *Sthanam*. In 1792 and again 1794, the East India Company entered into agreements with the then Nair recognising his rights and subsequently though the Nairs were deprived of their ruling powers were left in possession of their territory and they were paid a percentage of the amount of the revenue collections which took the form of a *Malikhana* allowance. The domain lands of the Nair were assessed to land revenue. It was also shown on behalf of the plaintiffs that in a suit in 1817 maintenance was decreed against the then Muppil Nair to junior members of the family. The Muppil Nair's right was first challenged in 1859 but the question was not decided in that litigation. In 1872 as the only surviving member of the family was a girl of about six years of age, the Court of Wards entered on the management of the entire estate and throughout the entire period of their management from 1872 to 1910 treated the estate as if it was a *Tarwad*. But there was no evidence which could be accepted as indicative of a considered decision by the Court of Wards to treat the property as a *Tarwad*. From 1910 when the then Muppil Nair assumed management of the estate and after 1925 when the present defendant came into possession, they made no conscious distinction between their position as *Karnavan* and *Sthani*.

Held, the findings of both the Courts that before 1792, the ruler of Kavalappara was an independent chieftain in his own right, exercising ruling powers, and had lands attached to his *Sthanam* were to be regarded as concurrent findings of fact which in accordance with the usual practice of the Board could not be disturbed. The effects of this finding cannot be avoided on the ground that it was a mixed question of law and fact. As the holding was the independent holding of a sovereign or semi-sovereign chief, it partook of the nature of an impartible *Sthanam* and there was no question of the Muppil Nair proving that the properties in his possession were impartible and of his exclusive ownership. The agreements with the East Indian Company by which the administration was regranted to the then Muppil Nair must be presumed to continue the estate with its previous incidents of impartibility and succession. The deprivation of the Kavalappara Nair of his ruling powers did not affect these incidents. It cannot be said that in the circumstances on the levying of the land revenue on the estate, the holding was converted into ryotwari tenure. Even if any conversion took place, it was so only in relation to the Government and not in relation to the other members of the family, with reference to whom the land continued to enjoy the benefit of the incidents which were previously attached to them. The maintenance decrees in the suit of 1817 were not inconsistent with the *Sthanam* nature of the properties and the Muppil Nair never consciously altered his position or agreed to its alteration. His possession never changed. The subsequent treatment by the Court of Wards had not the effect of altering the character of the property nor was there any considered decision on their part or any power to do so. The subsequent conduct of the Muppil Nair has no legal effect in altering its character for it did not create any estoppel, waiver or acquiescence. Therefore the original character of the property as *Sthanam* property in its relation to other members of the family, is still retained and the plaintiffs were not entitled to the declaration they sought.

Decision of the High Court in (1944) 1 M.L.J. 272, reversed.

Sir Herbert Cunliffe, K.C., P. V. Subba Rao and *Krishan Subba Rao* (Madras Bar) for Appellants.

C. S. Rewcastle, J. Platts-Mills for *V. K. Krishna Menon* and *H. J. Umrigar* for Respondents.

Their Lordships' Judgment was delivered by

M. R. Jayakar.—This is an appeal from a judgment and decree of the High Court at Madras dated 9th April, 1943,[1] which reversed a judgment and decree of the Court of the Subordinate Judge of Ottapalam dated 26th February, 1938.

The appeal arises out of a suit brought by the respondents, who are Malabar Hindus, for a declaration that the properties in the possession of the appellant (original defendant 1) were *Tarwad* or joint family properties belonging to the joint family consisting of the appellant and the respondents (original plaintiffs). The appellant is the head of a family, and original defendants II and III are members thereof, but as their interest coincided with that of the plaintiffs they were transposed as plaintiffs X and XI. The appellant is in possession and control of certain properties, to which the plaintiffs' claim is related. The appellant denied the claim and asserted that the properties appertained to his *Sthanam* (sometimes spelt as *Stanom*) and belonged to him exclusively as the *Sthani* owner thereof. The Trial Court upheld the contention of the appellant and dismissed the suit, while the High Court took a contrary view, decreed the suit and granted the declaration. The appellant, being aggrieved, appeals against that decision, and the question

1. (1944) 1 M.L.J. 272.

is whether the properties are Tarwad properties belonging to the joint family of the parties or the separate Sthanam properties of the appellant.

The immediate cause of the dispute was that in 1932 the Madras Marumakkattayam Act, which applied to Tarwads having Tarwad properties, was passed. It gave the members of the Tarwad the right to enforce partition of the Tarwad properties or, if they so wished, to have them registered as impartible. The Act did not apply to Sthanams. Taking advantage of the Act, however, the respondents applied in March, 1934, under section 43 of the Act, for registration of the lands in the possession and control of the appellant as an impartible Tarwad. The appellant denied the right of the respondents to any interest in the said properties and opposed the registration. An order for registration was, however, made by the Sub-Collector. The appellant applied to the High Court for a writ to quash this order. The High Court refused to issue the writ on the ground that the order did not specify any particular property as impartible and the appellant therefore had no grievance. The respondents thereupon brought the present suit on 10th October, 1934.

The dispute relates to what is called the Kavalappara Estate, which is situated in the Walluvanad Taluq of the district of Malabar. It appears that in pre-British times the Kavalappara territory was under the rule of an Indian Prince or Chief, who was the Muppil Nayar (sometimes spelt as Nair) or the senior male member of the Kavalappara Swarupam or dynastic family. The ruler appears to have been a Sthanam holder at this time.

The meaning of the word "Sthanam" and its three classes are explained by Mr. Sundara Aiyar in his book about Malabar and Aliyasanthana Law. The word :

" Sthanam," he says, "is of Sanskrit origin and means 'position' or 'place' or secondarily, in the Malayalam language ' a position of dignity.' In the case of certain positions of dignity there is property attached for the maintenance of the dignity and for the fulfilment of the duties attached to the position. As a technical word, ' Sthanam ' means a position of dignity of this kind, that is, one to which certain specific property is attached and which passes with it and is held by the person who fills this Sthanam for the time being and who is known as the Sthani . . . . . The origin of Sthanam is by no means clear and is more or less a matter for speculation. In the first instance, it seems to have owed its origin to political exigencies and was a creature of public law. (p. 249). (This would be class 1.). . . . . .It appears probable that, in the case of some chieftains and public officers, Sthanams were created by the original king, who would, when he appointed the head of a particular family to an office with hereditary succession, attach also certain lands for the maintenance of the office-holder. (This would be class 2.). . . . . . . .In addition to the families of princes and chieftains, there are other families also in which we find Sthanams in the technical sense though without any particular dignity attached to them. The creation of Sthanams in such cases was merely the result of imitation. When a family became very opulent and influential, it was sometimes deemed necessary, in order to keep up its social position and influnence, that the head should be able to maintain a certain amount of state and for that purpose the members of the family agreed to set apart certain property for him, and such property would descend to the head of the family for the time being. (P. 251) (This would be class 3.). . . . . .Whatever may be the origin of the Sthanam in any particular case, whether it was the result of public law or owed its origin to a grant by the ruling chief to the holder of an office, or was merely the result of an arrangement amongst the members of a Tarwad for the maintenance of its social prestige and influence, the property vests not in the family of the holder but in himself individually and descends to the person who succeeds to his dignity. Another feature is that the Stani's ownership and interest in the property of his Tarwad ceases on his succession to the Sthanam. His relationship and consanguinity with the family does not and cannot cease. For purposes of religious, funeral and other ceremonies, the Sthani continues to belong to the family." (P. 252).

As regards the property of a Tarwad, the same author explains its nature in the following words (P. 7) :

" The property belonging to the Tarwad is the property of all the males and females that compose it. Its affairs are administered by one of those persons, usually the eldest male, called the Karnavan. The individual members are not entitled to enforce partition but a partition may be effected by common consent. The rights of the junior members are stated to be (1) if males, to succeed to management in their turn ; (2) to be maintained at the family house ; (3) to object to an improper alienation or administration of the family property ; (4) to see that the property is duly conserved ; (5) to bar an adoption ; and (6) to get a share at any partition that may take place. These are what may be called effective rights. Otherwise, everyone is a proprietor and has equal rights." (*See* also " Customs and Customary Law in British India," Tagore Law Lectures, 1908, by Sripathi Roy, 1911 edition, p. 434.)

With a Tarwad and its property is connected its manager "Karnavan" whose position is explained as follows :

"The senior male member of a tarwad is called the Karnavan. He is not a mere trustee but bears the closest resemblance to the father of a Hindu family . . . . Under Malabar Law, the eldest member of the Tarwad is the Karnavan. In him is vested actually (though in theory in the females) all the property, moveable and immoveable, belonging to the Tarwad. It is his right and duty to manage alone the property of the Tarwad, to take care of it, to invest it in his own name . . . . and to receive the rents of the land . . . . . He is not accountable to any member of the Tarwad in respect of the income. . . . . . He is interested in the property of the Tarwad as a member of it to the same extent as each of the other members. All members, including the Karnavan, are entitled to maintenance out of the Tarwad property . . . . . unless he acts *mala fide*, he cannot be removed from such management."

As regards the Sthanam which is concerned in this case, it appears from the evidence that, in addition to the Kavalappara Sthanam, the holder thereof had other properties held by him as Sthanam properties under the Rajas of Palghat and Cochin, and with regard to these properties he appears to have been subordinate to these Rajas though independent in relation to the Kavalappara Sthanam lands. As regards the Palghat and Cochin Sthanams, the Subordinate Judge observed in his judgment :

"The Palghat and Cochin Sthanams differ in their origin from the rajastanam Kavalappara, which arose from the rulership. The properties of the Palghat and Cochin Sthanams come under a separate category. They are grants to the Muppil Nair for military services and were held by him separately as distinct and separate Sthanams. They might possibly come under class 2 of the origin of Sthanams given in Sundara Aiyar's Malabar Law, namely, Sthanams created by the ruling king who, when he appointed the head of a particular family to an office with hereditary succession, attached also certain lands for the maintenance of the office-holder."

The main dispute between the parties is whether the Kavalappara Swarupam which owns the Sthanams and properties aforesaid is a Malabar Tarwad or a Sthanam in the legal sense of that term. The plaintiff urges that it was an ordinary Malabar Tarwad, that the Nair had no ruling powers in the pre-British period, and that, even if he had ruling powers as an independent chieftain at that time, the advent of the British administration removed all the characteristics of the ruling families and converted them into ordinary Tarwads in the matter of enjoyment of property.

The defendant, on the other hand, urges that Kavalappara Nair had ruling powers as an independent chieftain in the pre-British days, that one characteristic of a ruling chieftain in Malabar and elsewhere is that the ruler and not the family owns all the preperty though the family members get maintenance allowed by the ruler either in the shape of lands or in cash, and that this characteristic of the holding was not put an end to when the British assumed sovereignty in Malabar but has continued to prevail till the present day.

These rival contentions crystallized in the following issues raised in the Court of the Subordinate Judge :—

Issue 1.—"Is the Kavalappara Swarupam a Malabar Tarwad, the Muppil Nair being the Karnavan of it and is it possessed of only joint properties in which all the parties to the suit are nterested ?"

Issue 2.—"Are and were the properties in the custody and under the management of the first defendant and of his predecessors, properties that appertain to a Sthanam in the legal sense of that term ?"

Issue 2-*A*.—"If so, have they lost their character as such (i) by allowing user of such properties as Tarwad properties, (ii) by the successive occupants of the alleged Sthanams acquiescing in their user as Tarwad properties, (iii) by the successive occupants of the alleged Sthanam waiving their rights over such property as Sthanam properties ; or (iv) by adverse possession by the Tarwad as against the Sthanam ?"

Issue 11.—"Whether the defendant really acted as Karnavan ?"

Issue 12.—"If so, whether such acts will create any estoppel against the defendant or deprive him of his rights as Sthani ?"

The findings of the Subordinate Judge on all these issues were in favour of the appellant. The detailed conclusions at which he arrived on these issues can be briefly stated as follows :

"The Kavalappara Nair has been recognised as an independent chieftain at the time that Tippu ceded Malabar to the British Government. The East India Company entered into treaties with him. The presumption in the case of rulers or independent chieftains is in favour of the impartible nature of their possessions. All the other Rajas or independent chieftains in Malabar are now found to be Sthanis in the legal sense. The way in which the Kavalappara Nair has been described in documents is identical with how those Sthanis have been described in their own documents in the respective periods. He is continuing to perform ceremonials which those quondam rulers are having. The fact that he has been giving maintenance to and meeting the extraordinary expenses of the other members of the family is not inconsistent with his position as a Sthani successor of the old ruling chieftain . . . . . Having given my best consideration to the evidence on record and the probabilities, the preponderance of the evidence is, in my view, in favour of the Sthanam nature of the properties."

The High Court on the other hand, in an appeal from the judgment and decree of the Subordinate Judge, came to the contrary conclusion[1]. The learned Judges (Lionel Leach, C.J., and Lakshmana Rao, J.) agreed with the Subordinate Judge that the heads of the Kavalappara families were formerly in pre-British times ruling chiefs and that the said rulers had Sthanams and that the Sthanams had lands attached to them which were held by the head of the family in his own right. They, however, did not attach much importance to this fact and assumed that the family of the parties was a Tarwad and the appellant its Karnavan, and that there was a presumption that all the property in the possession of the appellant was Tarwad or joint family property ; that he had failed to discharge the burden of proving that the said properties were of a Sthanam character. They further held that even if the properties were Sthanam properties previously, their subjection to the assessment of Government revenue at a later date had the effect of abolishing all the incidents previously attached to them and rendering what were by their nature separate and indivisible properties into the joint family properties. The learned Judges relied largely upon the fact that the Court of Wards during its management of the said properties, as will be stated later, regarded them as Tarwad properties. In the result they allowed the appeal, decreed the suit and granted a declaration that all the properties under the management of the appellant were Tarwad properties belonging equally to and jointly with the appellant and the respondents, the appellant being in management thereof as Karnavan only.

In view of this difference of opinion between the Courts, it is necessary to examine briefly the evidence in the case. It appears that before 1792 when Malabar came to be ceded to the East India Company by Tippu Sultan, the ruler of Mysore, the then ruler of Kavalappara was an independent chieftain in his own right, exercising ruling powers, and had lands attached to his Sthanam, including lands relating to the Sthanams granted as aforesaid by the Rajas of Palghat and Cochin. On this question, the Subordinate Judge and the High Court both agree, as stated above, and this view may therefore be regarded as a concurrent finding of fact which their Lordships would in accordance with the usual practice of this Board be loth to disturb. An attempt was made by the respondent to avoid the effects of this finding on the ground that it was a mixed question of law and fact, but their Lordships do not agree with this view. The result would be that if the Kavalappara holding in or before 1792 was the independent holding of a sovereign or semi-sovereign chief, it would partake of the nature of an impartible estate. As the learned Subordinate Judge pithily remarked :

"Can it be said that the family holds the rulership and the ruler is only an agent of the family ? The ruler can only be an individual and not the family ?

The rule relating to sovereign or semi or subordinate sovereign rulers and the impartible nature of their estates was stated by this Board, as early as 1855, in the case of *Baboo Gunesh Dutt* v. *Maharaja Moheshur Singh*[2] in the following words :

"Generally under Hindu Law, estates are divisible amongst the sons, when there are more than one son ; they do not descend to the eldest son, but are divisible amongst all. With respect to a Raj . . . . . . the general rule is otherwise and must be so. It is a sovereignty . . . . . a subordinate sovereignty no doubt but still a limited sovereignty, which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case."

1. (1944) 1 M.L.J. 272. 2. (1855) 6 M.I.A. 164 (187).

This rule was restated within more recent times in the case of *Sahdeo Narain Deo* v. *Kusum Kumari* [1], where their Lordships observed :

> " It is true that an estate only becomes impartible by custom, and that the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a king or independent chief, or even a semi-independent chief of sufficient importance."

Similar observations were made in another recent case, *Martand Rao* v. *Malhar Rao* [2] where it was stated that the possessions of sovereign or semi-sovereign chiefs would necessarily be impartible. Such was the position of the Muppil Nair and his holdings in pre-British times. There could therefore be no question of his proving, as the High Court has required him to do, that the properties in his possession were impartible and of his exclusive ownership.

The next question, is did these properties subsequently lose their character owing to any action on the part of the British Government ? The material facts relating to this question are as below :

In 1792 when Malabar came to be ceded to the East India Company, as stated above, that Company entered into an agreement with the Nair on 12th July, 1792, which, on its true interpretation, appears to have confirmed this position. It was an agreement entered into between two British officials, as agents of the East India Company on the one hand and the Kavalappara Nair on the other. The contents of this document appear to their Lordships very important as throwing light on the status and position of the Kavalappara Nair in relation to his territory, and also as regards the position he came to occupy in relation to the British Government in and after 1792. The material portion of the document is set out below :

The agreement refers in clause 1 to the cession of the territory by Tippu Sultan and the Company becoming the sovereign and rightful owners thereof. It mentions in clause 2 :

> " that the said country having formerly belonged to the ancestors of the said Kavalappara Nair he comes to Calicut and represented that he had been placed in charge of the said country of Koulparah by Keshoo Pillay the Diwan of Travancore and was assured by him in the name of the Company of being continued in his said territory at the place on condition of his assisting in the war against Tippu, which he did on various occasions by furnishing his Nairs and supplying the garrison . . . with grain ; on account of these services and having regard to the faith of the English Nation, it is agreed to place him in the administration of the country of Koulparah on behalf of the company.''

Then after stating what the Nair had to pay to the Company on account of the produce of the country and that he had agreed to submit to the directions of the Company from time to time, clause 5 mentions the disputes which were at that time being raised by the Raja of Cochin with regard to the territory of Koulparah and that with reference to this dispute the Nair agreed to prove his claim and to abide by whatever decision the Company might give.

It is clear from the words of this document, especially clause 2, that the East India Company accepted his representation with regard to the ownership of the territory in pre-British times and in consideration of his services rendered to the East India Company in the war against Tippu and in confirmation of the assurance given on behalf of the Company by the Diwan of Travancore based on his faith in the British people, the Company authorised the Nair to continue in the administration of the territory on their behalf and on the terms mentioned in the document. It would appear from subsequent events that at this time the administration included the whole of the administration as previously carried on, including justice. Their Lordships agree with the interpretation of the Subordinate Judge of the terms and effect of this document. The regrant of the administration by the East India Company to a previous ruler of the territory would fall within the principle enunciated by this Board in *Martand Rao* v. *Malhar Rao* [2] that :

> " if an impartible estate existed as such from before the advent of British rule, any settlement or regrant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession." (P. 49.)

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2. (1922) 44 M.L.J. 476 : L.R. 50 I.A. 58 : I.L.R. 2 Pat. 230 (P.C.).

1. (1927) 54 M.L.J. 397 : L.R. 55 I.A. 45 (56): I.L.R. 55 Cal. 403 (P.C.).

On the termination of this agreement, another agreement was entered into in September, 1794, between the Company and the Nair. It related to the collection of revenue only. Internal customs were abolished and external customs and administration of justice were taken over by the Company. The material words are :

> "The Company do hereby further stipulate and agree . . . . with the Kawlparrah Nair to deliver over to the management of him or his agents the several districts of . . . . . forming the Taluq of Cawlparrah in as far as regards the detail collection of the revenues of the said districts with the reservation of the authority . . . . . of the Company."

This agreement was not to be subject to alteration but was to be submitted to the revision and approbation of the Governor-General in Council after which . . . . . it was to be deemed complete and not to be deviated from during its term.

In the meanwhile, joint commissioners had been appointed to inspect the state and condition of Malabar on or about 11th October, 1793. The Commissioners reported, *inter alia*, on the claim of the Cochin Raja, disallowed it, and referred to the contents of the previous agreement and the settlement made thereunder. They came to the conclusion, on the evidence adduced before them, that the Kavalappara Nair was independent of any superiority on the part of the Raja of Cochin and concluded with the view that the evidence produced showed that the Nair was

> "reinstated during the war under the immediate and all-powerful protection of the Raja of Cochin's enemy the Diwan of Travancore"

mentioned above. This report was at a later date, under the instructions of the Governor-General, placed before him for his sanction and the recommendations were accepted by Sir John Shore, the then Governor-General in or about May, 1804, who added a recommendation (apparently in consideration of the Raja's previous services) that

> "the most positive instructions be given to the Revenue servants for treating those chieftains with attention, civility and kindness."

(*See* Exhibit 7 at pp. 131, 132 of the Documents and the Manual of the Malabar District by William Logan, 1906, pp. 483, 484, 487 and 488.) A significant statement appears at page 483 of Logan's treatise, that the Travancore Raja and his Diwan Keshoo Pillay mentioned in the document of 1792 had been allowed by the British authority a controlling power over the Malabar Rajas.

After the expiry of the five years covered by the agreement of 1794, the East Indian Company decided to take charge of the territory and to compensate the rulers by payment of a percentage of the amount of revenue collections, and it appears from the documents relating to this time that, though deprived of the ruling powers, the Rajas were left in possession of their territory subject to the payment and the limitations mentioned in the previous agreement. The compensation offered to the Rajas (including the Kavalappara Nair) took the form of a Malikhana allowance which, as the learned Subordinate Judge observes, was the equivalent of the benefit secured to them when they were deprived of their administration. Reference had been made to the rulers having domain lands for which they were paying no revenue in the past. There was no tax because the accounts on which the settlements were based belonged to the time when they were rulers and the lands were subject to no taxes. The Muppil Nair lived on the proceeds of the lands. It was suggested that these domain lands needed taxation and they were accordingly taxed.

As regards the Malikhana allowance, the appellant claimed in his written statement that, as there was no permanent settlement in Malabar at that time as in other parts of British India, it was a grant made by the East India Company to the Muppil Nair in recognition of the sovereign power once exercised by him and the meritorious services rendered to the East India Company. He claimed that this was one of the unmistakable proofs that the Kavalappara Swarupam was not an ordinary Tarwad but was a Sthanam. The Subordinate Judge has accepted the view that it is an indication of the Kavalappara Nair's ruling chieftainship

The High Court also, notwithstanding an apparently contrary expression in certain parts of the judgment, says : (*see* p. 176 line 47, of the Record)

"there can be no doubt that the head of the Kavalappara family was a ruling chieftain in 1792 because in 1806 the East India Company granted to the family a Malikhana."

In the light of this evidence, their Lordships accept the conclusion of the Subordinate Judge that the deprivation of the Kavalappara Nair of his ruling powers did not affect the incidents which attached to his properties, and they continued to be impartible and were owned by him exclusively. Their Lordships do not agree with the view of the High Court that on the levying of the land revenue on the estates of these Rajas and chieftains under the circumstances mentioned in the several documents referred to above their holdings were converted into *ryotwari* tenure. It may be added that even if any conversion did take place it was so, as the High Court observes in one part of the judgment (at p. 176, line 38, of the Record) ony in relation to the Government and not in relation to the other members of the family, with reference to whom the lands continued to enjoy the benefit of the incidents which were previously attached to them.

The main attack of the plaintiffs against the Sthanam character of the properties is the circumstance that maintenance was decreed against the then Muppil Nair to junior members of the family in the year 1817. It was argued that the grant of maintenance was inconsistent with properties being Sthanam in their character, because the other members of the family, it was urged, have, *ex hypothesi*, no rights of maintenance against the Sthani out of the Sthanam property in his hands. The High Court has accepted this view, contrary to that of the Subordinate Judge. The documents material in this connection are Exhibits "O" and "P," being the decree and judgment respectively in two suits for maintenance brought in the year 1817 against the then Muppil Nair, the first by the then third Nair, a minor, and the second by his mother. It is material to note what the issue was and what was decreed in these suits. In the pleadings of both the parties the claim for maintenance was stated to be based on customary rights. The plaintiff alleged it is "the usual custom" that the Nair should pay the maintenance. The defendant admitted "the custom" but denied his liability to pay the maintenance on the ground that his ancestors in ancient times had aleady settled in accordance with the "usual practice" certain lands on a lady called Amma Nethiar for the maintenance of herself and the junior members, and that the maintenance claimed in the suit, even if it was due, which he denied, should primarily come out of the lands so set aside in previous times. He also denied his liability on the ground that the minor and his mother, contrary to his advice and that of the well-wishers of the family had gone away to live elsewhere. The defendant denied his liability also on other grounds which it is unnecessary to consider in this case. He, however, expressed his willingness to supplement the maintenance, if the Court thought proper, on particular occasions. The Judge, while admitting that it was the responsibility of Amma Nethiar to maintain the plaintiffs, held that as the plaintiffs stood in the very near relationship of sister and nephew to the defendant and were his next heirs it was "only proper" that the defendant should grant them a periodical allowance for past and future maintenance. In the light of the pleadings set out above, the admissions made therein by both sides about the customary nature of the maintenance and the words it was "only proper" in the judgment, their Lordships cannot accept this as a decision contradicting the incidents of the property in the hands of the Muppil Nair. The maintenance claimed was a customary one originating in ancient times when admittedly the Muppil Nair was a Sthani in possession of Sthanam rights. There is no evidence as to how the maintenance allowance arose, whether it was given in recognition of a legal claim or was only a generous provision made for the benefit of the women and younger members, which the Raja was perfectly competent to do out of property which he regarded exclusively as his own. The claims of generosity often prevail over a sense of ownership, especially when the recipient of the bounty is a near relative in a dependent position. Their Lordships think that in the proceedings of these two cases there is

hardly anything to support the view of the High Court that the decrees in these two suits are inconsistent with the Sthanam character of the properties in the possession of the then Muppil Nair or that he did anything which could be regarded as an admission that the properties in his hands were not Sthanam properties. On the question whether and how far the existence of a maintenace allowance is inconsistent with the Sthanam character of the property, on which it is grounded, the following passage in Sundara Aiyar's book (page 255, bottom) may be noted ;

"The point of view suggested in some cases in which the question has arisen is that the members of the family have rights of maintenance in the property of the Sthanam itself; that is practically assimilating these properties to impartible zemindaries before the recent cases."

Besides, the Sthanam in dispute in this case belonged, as stated above, to the second category, and in such a case the existence of a maintenance allowance would be perhaps not so inconsistent as in the case of a Sthanam of the third class, carved out of the family property for the support and dignity of its senior member.

In the year 1859 came what may be regarded as the first challenge to the Muppil Nair's rights in the course of the long and chequered history of this property. It was Suit No. 2 of 1859 in the Zilla Civil Court of Calicut, launched by the remaining members of the family and their alienees against the then Muppil Nair to remove him from management on the ground that he had joined in the execution of a Karar (Agreement) under which he (when he was junior Nair) renounced his rights in the management in favour of his next junior. The answer of the Muppil Nair was that the Karar was not genuine, the properties were Sthanam and the plaintiffs had no right to claim them. The Judge found in favour of the Nair that the Karar was not genuine and dismissed the suit, holding that it was unnecessary to go into the question whether the properties belonged to the Tarwad or to the Sthanam. This litigation, therefore, did not decide the question at issue in this appeal. It may be noted that there was no appeal by the plaintiffs from this decision, which was given in the year 1863.

The Muppil Nair, against whom the suit of 1859 was brought, died in 1872. The only surviving member of the family then was a girl of about six years of age called Parvathi Amma Netiyar. In the meanwhile, a Court of Wards had been established under Madras Regulation V of 1804 for the purpose of taking into its custody and management and thereby preserving the estates of persons incapacitated by minority, sex or natural infirmity. Acting under the powers this Regulation gave them, the Court of Wards entered on the management of the entire estate, including the properties allotted as aforesaid in the name of Amma Nethiyar, which it was thought unnecessary to keep distinct from the other properties. It appears from the evidence that the Court of Wards throughout the entire period of their management from 1872 till 1910 treated the estate as if it was a Tarwad, but this was apparently without any investigation into the true nature of the property. If the grounds on which the Court of Wards could take possession of the lands under the Regulation arose, it made no difference to them whether the property was Tarwad or Sthanam. The only person entitled to the property then was, as stated above, a minor girl, and that fact gave enough ground to the Court of Wards to take possession and manage the proeperty. Besides, there was no adult male at that time to question the treatment by the Court of Wards of the property as Tarwad property. This course appears to have gone on for several years, but in the year 1895 the Collector of Madras, who was agent to the Court of Wards, probably entertaining some doubts as to the nature of the properties, issued a questionnaire (*see* pp. 1135-6 of the Exhibits) to the manager of the estate. Several questions were put to him and his formal answers obtained. The questionnaire begins with the words :

"A detailed report may be sent at an early date regarding the matters mentioned below."

In answer to Question No. 2. . . . . .

"whether Tarwad properties are set apart exclusively for the maintenance of the members of the Tarwad who are not Sthanis,"

the reply was :

"There is nothing."

Question 4 was :

"If the answer to the second question above is 'No,' how do the other members of the Tarwad maintain themselves? Whether they had any claim for maintenance over the Sthanam properties?"

The answer was :

"It is the custom that the Muppil Nair from and out of the Sthanam properties gives to the other members the expenses for their maintenance and therefore they have a claim to the Sthanam properties for their maintenance."

This answer is in accord with the defence adopted by the defendant Muppil Nair in the suit of 1817 mentioned above. It is difficult to understand why the High Court set aside this clear answer of the manager as being 'obviously not correct.' The manager knew best the incidents of the property of which he was the manager and apparently the Collector of Malabar in sumitting a detailed questionnaire for his consideration and asking for his report must have thought that his opinion on the matter was valuable. It is to be noted that in none of the documents, relevant during this period, is there anything disclosing the reasons why the Court of Wards treated this property as Tarwad. The respondents' counsel suggested that it must have been so because, under the rules relating to Sthanams, male succession having come to an end on the death of the Muppil Nair in 1872 the property reverted back to the Tarwad and took the form of Tarwad property. Authorities were cited before their Lordships to support this legal view and they were invited to end this long litigation at the stage of its final appeal on the basis of this legal point, which was not urged in the pleadings and had not found any place in the long and elaborate judgments of the Courts in India. Their Lordships are asked, so to speak, to take this short cut on the ground that the question is purely one of law and therefore can be entertained at this late stage. Their Lordships are most unwilling to adopt this course and to undo all that has been done in this case during several years. They express no opinion on the validity or otherwise of this point except to say that there is nothing to indicate that the Court of Wards treated the property as Tarwad because they were aware of or accepted this legal view.

The difficulty in accepting it arises also from the fact that Paravathi Netiyar attained majority in 1887 and had a minor son, who died before he could succeed to the Sthanam. Whether this son on his birth would not revive the male succession which had ended for a time and thus the Sthanam male line would continue is a question fraught with difficulty. At page 258 of Sundara Aiyar's book it is stated that the question whether a Sthanam becomes extinct on the extinction of the male members or is only in abeyance during the absence of the male member, so as to be capable of being revived, does not admit of an easy solution, and the author concludes with the observation that if a modern incident of this kind arose, it would probably be not an easy one to decide.

Reliance was placed upon certain proceedings which took place in 1887, when Parvathi Amma Netiyar attained majority, but on a careful perusal of the several applications relevant on this question the matter appears to be equivocal. For instance, in many of the documents, words are used which are appropriate to the nature of the property as Tarwad as also Sthanam. On the other hand, in some of them words are used which indicate a preference for the Sthanam view. The fact that when Parvathi Netiyar had a son, she applied to the Government that possession should be taken in order to preserve the property during the minority of her son, is not decisive, and is equally intelligible on either hypothesis.

Their Lordships have come across no evidence during the long period of the Court of Wards' management which can be accepted as indicative of a considered decision by the Court of Wards to treat the property as a Tarwad. This is apart from the question whether the Court of Wards had the power under the relevant Act to change the nature of the property of which they took possession. It was conceded, and in their Lordships' opinion rightly, in the course of the respondents' argument that if the property bore the character of a Sthanam at the date when the Court of Wards took possession, the subsequent activities of the Court of Wards

would not change its character. Their Lordships therefore do not attach that importance to the treatment of this property by the Court of Wards which the High Court has ascribed to it.

In 1910, the Muppil Nair immediately previous to the present one assumed management and after 1925 the present Muppil Nair came into possession. During the period of their management there is no doubt that they made no conscious distinction between their position as Karnavan and Sthani. Whereas, on the one hand, much of their action is intelligible on the footing that they thought that their position was that of a Karnavan, there are, on the other hand, many contrary indications. For instance, as stated in the Subordinate Judge's judgment, they exercised the functions and privileges and enjoyed the ceremonial and other dignities relating to their status as the owners of a Sthanam. Further, they continued to use in various documents relating to purchases and other matters the title of "Karakkat Kumaran Raman", which had been appropriated to their position as Sthani. These documents, as the learned Subordinate Judge points out, extend from the year 1745 up to 1926 (*see* Ex. CCCIII, part 2, p. 1361). It therefore appears that the distinction which exists between the two positions as a matter of law was not fully appreciated by the defendant or his predecessor. This is further indicated by the different answers which the defendant gave in the Subordinate Judge's Court when subjected to cross-examination at the hands of the plaintiffs' Advocate. In the learned Subordinate Judge's judgment are detailed these answers, and their Lordships agree with his conclusion, based on the explanation given of his conduct by the defendant in his deposition, that he continued the management on the same lines as the Court of Wards and had no idea of the real legal position of the estate when he entered on the management. But, apart from it, the conduct of the defendant is legally material only if it could lead to an estoppel, acquiescence or waiver. But, as the learned Subordinate Judge points out, no such questions could arise on the evidence in the case. Clear issues were raised on these points; they were all decided against the plaintiffs; the High Court, in the view it took, did not go into these matters; and there has been no argument addressed to their Lordships on these questions. As the learned Subordinate Judge points out, admissions which have been made under a mistake as to the true legal character of the estate will not operate to create an estoppel or acquiescence. No one was mislead into doing anything to his detriment as a result of this mistaken view. There was "no representation, no acting on it, no misleading, and no change of position on such representation. When all are under a mistake," there is neither estoppel nor waiver nor acquiescence.

Before concluding this judgment, it would be necessary to consider one or two matters to which their Lordships' attention was invited by the respondents' counsel. The first relates to the difficulty of identifying the properties in this suit. With regard to this, the position is as follows:—Both the parties wanted a decision with regard to *all* the properties in the possession of the defendant. In his plaint the plaintiff asked for a declaration that all the properties under the management of the first defendant were Tarwad properties belonging equally and jointly to the plaintiffs and the defendants. In the defendant's written statement this allegation was met by a counter-allegation that all the properties in his possession were Sthanam properties. The defendant, in paragraph 16 of his written statement, sought to obtain a specification of the properties claimed by the plaintiffs as joint properties, and added that in the absence of such specification he was unable to urge his specific rights with regard to those properties, that the prayer for a declaration was indefinite and vague as no schedule of properties was given with a proper specification to enable the defendant and the Court to identify the properties. He added that the plaintiffs refused to comply with the imperative provisions of the Civil Procedure Code relating to specification of properties even after the defendant brought the defect to the notice of the Court and the plaintiffs by means of a separate petition. He raised a specific issue (No. 9) on this point, on which the learned Subordinate Judge's finding was in the plaintiffs' favour

on the ground that

> "the same point was considered by my predecessor in an application of the defendant in 1934. He gave a ruling to the effect that such a schedule was unnecessary as the suit is really one for establishing the plaintiffs' status in the family. That order has been confirmed by the High Court."

The plaintiffs accepted this position and took the risk of having a decision regarding all the properties in the possession of the defendant.

In reply to questions from the Board during the argument, attempts were made to identify the properties, but, in their Lordships' opinion, they have failed. The question, therefore, is whether, at this late stage, their Lordships should direct an enquiry regarding the identification of the properties or treat the suit as both parties and the Courts in India have done. Their Lordships, after careful consideration, feel that to direct such an enquiry at this stage would have the effect of prolonging this litigation, which began thirteen years ago, and of raising questions of a complicated character leading perhaps to a revival of controversies which have long been agitated and which their Lordships desire to terminate by their judgment in this appeal. They are therefore unwilling to adopt this course.

A further question of a similar character was raised whether the properties which had been acquired by the defendant have been merged with the Sthanam. Though detailed issues were raised in the case, this question was not suggested and no attempt was made before the Subordinate Judge to distinguish between properties previously owned and subsequently acquired. Their Lordships do not find any discussion of this question in the judgment of the Subordinate Judge, who was asked and gave his decision with reference to all the properties in the suit. Before the High Court the question appears to have been raised and the Court decided it in favour of the plaintiffs, putting the onus of proof on the defendant. Their Lordships have already stated their view about the onus of proof in this case. Besides, as already stated, most of these properties, from 1745 up to comparatively recent times in 1926, were acquired in the Muppil Nair's official name of Karakkat Kumaran Raman (*see* pp. 136-143 of the Subordinate Judge's judgment), which led the learned Subordinate Judge to observe that

> "this uniform dealing shows that the Sthanam and Sthanam properties were recognised as related right through the period commencing from 1745."

In view of these facts, it seemed necessary for the plaintiffs, as an alternative case, to select and specify the particular properties in the defendant's possession, which they sought to claim on this ground, notwithstanding the general and comprehensive declaration they claimed regarding all the properties in the defendant's possession. It therefore appears to their Lordships undesirable, on the same grounds as relate to the identification of the properties, to permit this question to be raised at this stage. As both parties took the risk of having a decision regarding all the properties in this suit, making no distinction between one class of such properties and another, they must rest content with such a decision.

To sum up · the nature of the properties in the suit during the pre-British period is clearly established as an impartible Sthanam. There is no evidence that the British Government altered the character of this property so far as the other members of the family are concerned, although they made it liable to tax with reference to the claims of the Government. The maintenance decrees in the suits of 1817 were not inconsistent with the Sthanam nature of the properties, and the Muppil Nair did not admit in those suits that his properties were not Sthanam. He never consciously altered his position or agreed to its alteration. His possession never changed. There was only one challenge to his title in the year 1859, but the Court did not decide the question. The subsequent treatment by the Court of Wards had not the effect of altering the character of the property, nor was there any considered decision on their part or any power to do so. The subsequent conduct of the Muppil Nair has no legal effect in altering its character for it did not create any estoppel, waiver or acquiescence. Their Lordships are therefore

of opinion that the original character of the property in its relation to the other members of the family is still retained and the plaintiffs are not entitled to the declaration they sought in the case.

For the reasons stated above, their Lordships agree with the conclusion at which the Subordinate Judge arrived, and are of opinion that the judgment of the High Court and decree be reversed, and that of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The respondents will pay the costs of the appellant before this Board and in the High Court.

Solicitors for Appellant ; *Cassavetti Coustas & Co.*

Solicitors for Respondents ; *Hy. S. L. Polak & Co.*

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Vai Km. Vayyapuri Vathiar .. *Petitioner**

v.

R. Somianarayana Iyengar and others .. *Respondents.*

Court-Fees Act (VII of 1870 as amended in Madras), section 7 (iv) (c)—Suit regarding temple property—Claim for declaration, injunction and accounts—Inam land having cocoanut trees—Valuation—Jurisdictional value of suit.

The plaintiffs claiming to be hereditary trustees of a temple instituted a suit for permanent injunction restraining the defendants from interfering with the plaintiffs' management of the suit temple and its properties, delivery of cash and moveables and for a declaration that the plaintiffs were the sole trustees and managers of the temple. The reliefs were valued separately, the injunction under section 7 (*iv*) (*d*), the relief for account on the value of the claim made under section 7, clause (*i*) and the declaration under Article 17-B of Schedule II of the Court-Fees Act. The Court below on a consideration of the llegaations in the plaint came to the conclusion that the relief for declaration and injunction fell under section 7 (*iv*) (*c*) of the Court-Fees Act. The Judge however, in arriving at the valuation took into consideration the value of the moveable properties included in the suit.

Held, that plaintiffs were bound to pay court-fee under the proviso to section 7 (*iv*) (*c*) of the Court-Fees Act as amended in Madras, only on the value of the immoveable property forming the subject-matter of the suit.

Held also, that where the land consisted of inam land falling under section 7 (*v*) (*c*) of the Court-Fees Act the fact that there were cocoanut trees on the land was no ground for requiring the land to be valued otherwise than on the basis of fifteen times the net profits.

Held further, that the jurisdictional value of the suit was the value as ascertained under section 7 (*iv*) (*c*) together with the value of the claim for accounts.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Devakottai in O.S. No. 79 of 1945.

G. R. Jagadisan for *A. V. Viswanatha Sastri* and *N. C. Srinivasan* for Petitioner.

R. Gopalaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision petition filed against the order of the learned Subordinate Judge of Devakottai directing the plaintiffs to pay court-fee on an amount of Rs. 14,200. The plaintiffs claiming to be the hereditary trustees of a temple instituted the suit for a permanent injunction restraining the defendants from interfering with the plaintiffs' management of the suit temple and its properties, delivery of cash and moveables collected on 13th March, 1945 and declaration that the plaintiffs are the sole trustees and managers of the Poeisolla Meyyar Ayyanar temple at Sankarapuram. These reliefs were valued separately. As regards the injunction they paid court-fee of Rs. 100 under section 7, clause (*iv*) (*d*) of the Court-Fees Act. As regards the relief for account they paid court-fee of a sum of Rs. 400 under section 7, clause (*i*) ; for declaration they paid a fixed fee of Rs. 100 under Schedule II, Article 17-B. The Court below on a considera-

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* C.R.P. No. 1114 of 1946. 11th December, 1947.

tion of the allegations in the plaint came to the conclusion that the relief for declaration and injunction fell under section 7, clause (*iv*) (*c*) of the Court-Fees Act, the relief for injunction being consequential on the relief for declaration. This view of the learned Judge is no doubt correct but under the proviso to section 7, clause (*iv*) (*c*) of the Court-Fees Act added by the Madras Amendment, where the relief sought is with reference to any immoveable property, such valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by paragraph (*v*) of section 7. The learned Judge in the Court below has taken into consideration in arriving at the value on the basis of the proviso the moveable properties also which, in my opinion, is wrong. The immoveable property owned by the temple consists of a cocoanut tope of the extent of 12 or 13 acres and it is also alleged that the temple also owns other lands about which I am not able to find evidence on record. The learned Judge valued this tope under section 7, clause (*v*), sub-clause (*e*) as if it is a garden and, therefore, directed the plaintiffs to pay the court-fees on half the market value of that property. From the plaint it will be seen that this tope is really an inam land falling under section 7, clause (*v*) (*c*) of the Court-Fees Act. Under this clause the value for purposes of court-fee is 15 times the net profits. In *Kullappa Goundan* v. *Abdul Rahim*[1], it has been held that if the land is assessed land falling under section 7, clause (*v*) (*b*), the fact that there is a cocoanut tope in such land would not bring such land under section 7, clause (*v*) (*c*) of the Court-Fees Act. On the analogy of that decision I think where the land is inam land falling under section 7, clause (*v*) (*c*) of the Court-Fees Act, the fact that there are cocoanut trees in the land is no ground for requiring the land to be valued on such basis. I therefore hold that the cocoanut tope should be valued on the basis of 15 times the net profits. There is no evidence on record regarding the profits from this tope. I am therefore unable to fix the court-fee payable on that basis. The learned Judge in the Court below will, therefore, fix the value of the tope on that basis, exclude the value of the moveables and include the value of any other lands which the temple is proved to own on the basis of valuation under section 7, clause (*v*) of the Court-Fees Act and give an opportunity to the plaintiff to pay court-fee on half such value. Of course, under section 8 of the Suits Valuation Act, the value arrived at under section 7, clause (*iv*) (*c*) will also be the value for purposes of jurisdiction. The plaintiffs in the plaint have given separate valuations for injunction and for declaration which of course on that basis would be the value also for purposes of jurisdiction. But now it has been held in this case that the declaration and injunction are reliefs falling under section 7, clause (*iv*) (*c*) ; the value as given in the plaint for those reliefs need not be added for purposes of jurisdiction. The only addition that should be made for the valuation arrived at under section 7, clause (*iv*) (*c*) is the value given in the plaint for accounts, namely, the sum of Rs. 400. This amount will be added to the amount ascertained under the proviso to section 7, clause (*iv*) (*c*) for purposes of arriving at the value of jurisdiction.

The result is that this Civil Revision Petition is allowed, the order of the Court below is set aside and the matter is remanded for disposal in the light of this judgment. There will be no order for costs in this Court.

B.V.V. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Kayichankandi Ayissa .. *Appellant**

v.

Variyil Kunhaikalanthan and others .. *Respondents.*

Limitation Act (IX of 1908), Schedule I, Article 142—Suit in ejectment—What plaintiff must prove—Vacant site—Mode of proving possession—Presumption as to possession following title—Applicability.

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1. (1916) I.L.R. 40 Mad. 824.

* S.A. No. 1908 of 1945. 17th December, 1947.

A person suing in ejectment on the strength of his title and dispossession should establish not only title but also possession within twelve years prior to the suit. If once he establishes that the date of possession or discontinuance of possession is within twelve years from the date of suit as required by Article 142 of the Limitation Act, in order to establish prior possession within the meaning of the first column of that article it is permissible having regard to the nature of the land such as vacant site, or having regard to the absence of evidence of effective possession or conflicting evidence as to possession before the date of dispossession, to invoke the aid of the presumption of possession following title. This is merely a mode of proving prior possession as required by Article 142. The Full Bench decision in *Official Receiver, East Godavari* v. *Govindaraju*, (1940) 2 M.L.J. 190 : I.L.R. 1940 Mad. 953 (F.B.), does not purport to deal with the mode or manner of establishing possession but only lays down the requisites to be proved in a suit falling under Article 142.

Appeal against the decree of the District Court, North Malabar, in A.S. No. 342 of 1944 preferred against the decree of the Court of the District Munsiff, Kuthuparamba, in O.S. No. 730 of 1940.

K. Kuttikrishna Menon for Appellant.

B. Pocker for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He sued for recovery of possession of a site alleging that the defendant came into possession under an oral lease of 1932. The Courts below have found that the oral lease set up by the petitioner is false but that he has title to the suit property. The learned District Munsiff also found on a consideration of the evidence adduced by both parties that neither side had established effective possession of the site till 1932 and that the site was vacant. Following the decision in *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[1], the learned District Munsiff decreed the suit. On appeal, however, the learned District Judge while agreeing with the District Munsiff in all the findings of fact dismissed the suit on the ground that the petitioner had failed to prove effective possession before 1932. In his view, it is not enough for the petitioner that he is the owner and that the dispossession took place in 1932, that is, within 12 years prior to the institution of the suit but that he should also prove that he had exercised acts of ownership before 1932. In support of this view he relies on the decision of the Full Bench in the *Official Receiver, East Godavari* v. *Govindaraju*[2] and he also thinks that the decision in *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[1], was overruled by the Full Bench.

In my opinion, the learned Judge is wrong in his interpretation of the decision of the Full Bench. The decision in *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[1], recognises as does the Full Bench, that a plaintiff suing in ejectment on the strength of his title and dispossession should establish not only title but also possession within 12 years prior to suit and follows the very decision in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[3], which is also referred to and followed in the Full Bench. If once the petitioner establishes that the date of dispossession or discontinuance of possession is within 12 years from the date of suit as required by Article 142 of the Limitation Act, in order to establish prior possession within the meaning of the first column of that article it is permissible, according to the decision in *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[1], having regard to the nature of the property such as vacant site or land or having regard to the absence of evidence of effective possession or conflicting evidence as to possession before the date of dispossession, to invoke the aid of the presumption of possession following title. This is merely a mode of proving prior possession as required by Article 142 and the decision of the Full Bench in *Official Receiver, East Godavari* v. *Govindaraju*[2]. In my view, the Full Bench does not purport to deal with the mode or manner of establishing possession and it only lays down the requisites to be proved in a suit falling under Article 142. In the decision in *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[1], it is stated,

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1. (1930) 61 M.L.J. 224 : I.L.R. 54 Mad. 622.
2. (1940) 2 M.L.J. 190 : I.L.R. 1940 Mad. 953 (F.B.).
3. (1888) L.R. 16 I.A. 23 : I.L.R. 16 Cal. 734 (P.C.).

"But the possession to be proved is such possession, as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any acts of effective possession and therefore the normal method of possession is not referable to any such act, possession must follow title, since the defendants are no more able than the plaintiff to claim effective possession for 12 years before suit. Possession in such circumstances is with the party holding title."

This view of the law is based on the decision of the Privy Council in *Runjeet Ram Panday* v. *Goburdhun Ram Panday*[1]. If the law were otherwise and the owner of land which is either vacant or is of no immediate use to him refrains from exercising acts of ownership he would lose the property even though the dispossession was within 12 years from the date of the institution of the suit. He, however, should not allow the person who trespasses upon the property to continue in possession for more than 12 years from the date of trespass. Thus a person who purchased a vacant site in 1920 is entitled to keep it vacant without putting it to any use but if another person dispossesses him in 1936 the owner should institute his suit before 12 years from 1936 expire and is entitled to invoke the presumption of possession being with owner during the period from 1920 to 1936. So far as I could see the Full Bench does not stand in the way and does not disentitle the owner from relying on such presumptive proof. The view of the learned District Judge that the petitioner must prove effective possession by adducing evidence of acts of possession as owner is erroneous and the decision of the Full Bench has not in any way altered the law as laid down in *Ramanathan Chettiar* v. *Lakshmanan Chettiar*[2], which was also followed in other cases.

For these reasons, I am unable to agree with the decision of the learned District Judge and his decision is therefore reversed and that of the District Munsiff is restored with costs here and in the Court below.

No leave.

B.V.V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, MR. JUSTICE RAJAMANNAR AND MR. JUSTICE YAHYA ALI.

Badam Satyanarayanamurthi son of Venkataratnam .. *Appellant**

v.

Badam Venkataramanamurthi and others .. *Respondents.*

Civil Procedure Code (V of 1908), Schedule II, paragraphs 17 and 5—Scope—Agreement to refer to the arbitration of a named individual—Death of such individual before making award—Court, if can appoint another arbitrator in his place.

When an agreement provides for arbitration by a named arbitrator or arbitrators, and such arbitrator or any one of such arbitrators is not available on account of death, refusal to act or other reasons before an application is made under paragraph 17 of Schedule II of the Civil Procedure Code, the Court has no power to appoint an arbitrator in his place. It is only if there is no provision in the agreement for the appointment of an arbitrator and the parties cannot agree, that the Court has power to appoint an arbitrator.

Where, however, on the date of an application under paragraph 17 the arbitrator was alive and died afterwards, the case should be decided on the footing that there was a valid order of reference to him and thereafter he died and the question, whether under paragraph 5 another arbitrator can be appointed by the Court in his place will have to be decided on the construction of the particular agreement.

If the intention of the parties as expressed in the muchilika is to be bound by the decision of a particular arbitrator, any provision which enables the Court to appoint another arbitrator would not be consistent with the agreement. The choice of a particular arbitrator by the parties is the result of personal confidence and trust in his knowledge, character and qualification and the question of the personnel of the arbitrator cannot be said to be a subsidiary and incidental matter.

1. (1873) 20 W.R. (Civil) 25. 622 at 424.
2. (1930) 61 M.L.J. 224 : I.L.R. 54 Mad.

*Appeal Against Order No. 520 of 1946. 19th December, 1947.

Bala Pattabhirama Chetti v. *Seetharama Chetti*, (1894) I.L.R. 17 Mad. 498 and *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*, (1930) 60 M.L.J. 676 : I.L.R. 54 Mad. 469, considered and explained. *Sadiq Husain* v. *Nazir Begum*, (1911) 21 M.L.J. 1151 : L.R. 38 I.A. 181 : I.L.R. 33 All 743 (P.C.) referred.

Appeal against the order of the District Court of East Godavari, at Rajahmundry, dated 13th September, 1946 and made in C.M.A. No. 11 of 1946 preferred against the order of the Court of the Subordinate Judge of Coconada in O.S. No. 34 of 1942, dated 20th February, 1946.

P. Somasundaram for Appellant.

K. Bhimasankaram and *M. V. Nagaramayya* for Respondents.

In pursuance of an order of reference, dated 8th December, 1947, by Happell and Govindarajachari, JJ., this appeal coming on for hearing, the Court delivered the following

JUDGMENT : *Rajamannar, J.*—This appeal has been directed to be posted before a Full Bench of three Judges, because the learned Judges, Happell and Govindarajachari, JJ., who heard it in the first instance, were of the opinion that there was a conflict between the decisions of two division benches of this Court in *Bala Pattabhirama Chetti* v. *Seethaıama Chetti*[1] and *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*[2], and that the view taken in the latter decision of the judgment of the Privy Council in *Sadiq Husain* v. *Nazir Begum*[3], seemed to require reconsideration.

The appellant Satyanarayanamurthi and Krishnamurthi were brothers. The respondents are the legal representatives of Krishnamurthi who died *pendente lite*. The appellant and Krishnamurthi executed, on March 25, 1935, a muchilika agreeing to refer certain disputes between them, relating to their joint cultivation and to a business carried on by them in partnership with a stranger, to the decision of an arbitrator, one Pydah Ramakrishnayya (Ex. P-3). It is common ground that this arbitrator did not make any award. On 7th October, 1938, the two brothers along with another brother named Subba Rao executed another muchilika in favour of a different arbitrator, one Nalam Ramalingayya, referring to him disputes relating to the partition of joint family properties as well as the disputes between the two brothers, *viz*., the appellant and Krishnamurthi (Ex. P-2). Ramalingayya made an award in respect of the partition of joint family properties on February 28th, 1942, but none in respect of the disputes between the two brothers. On 7th August, 1942, Krishnamuthi filed in the Court of the Subordinate Judge, Coconada, an application under paragraph 17 of Schedule II to the Civil Procedure Code. He prayed that the muchilika, dated 25th March, 1935, in favour of Ramakrishnayya and the muchilika, dated 7th October, 1938, in favour of Ramalingayya be filed into Court, and an order of reference be made to the said arbitrators or any other arbitrator who may be chosen by the parties. The application was registered and numbered as a suit, O.S. No. 34 of 1942. On 4th January, 1943, the Subordinate Judge rejected the plaint for non-payment of deficit court-fee. Krishnamurthi died and the present respondents, as his legal representatives, filed an appeal to the District Court, East Godavari. The appeal was dismissed on 21st October, 1944. There was a second appeal to this Court, No. 444 of 1945, which was allowed on 13th November, 1945 and the suit was remanded to the Court of the Subordinate Judge for disposal on the merits.

Meanwhile, on 19th July, 1943, Ramalingayya had died. At the hearing of the suit, after remand, an objection was raised on behalf of the appellant that the Court had no power to appoint a new arbitrator in the place of the deceased Ramalingayya. This objection was upheld and the suit dismissed. On appeal, the learned District Judge, East Godavari, set aside the dismissal of the suit, directed the reference to arbitration to be filed and the suit restored to the file and proceeded

1. (1894) I.L.R. 17 Mad. 498.
2. (1930) 60 M.L.J. 676 : I.L.R. 54 Mad. 469.
3. (1911) 21 M.L.J. 1151 : L.R. 38 I.A. 181 : I.L.R. 33 All, 743 (P.C.).

with. The learned Judge indicated that Ramakrishnayya might be appointed arbitrator or a new arbitrator or arbitrators who may be chosen by both the parties or the Court may itself appoint an arbitrator. The defendant appeals against this order of the learned District Judge.

The question for decision can be formulated as follows : Where two persons agree that the differences between them shall be referred to the arbitration of a named individual and that individual dies before an award is made, has the Court power to appoint another arbitrator in his place ? This question must be answered with reference to the provisions of Schedule II of the Civil Procedure Code, 1908, which have been repeated by the Indian Arbitration Act, 1940. Paragraphs 1 to 16 of that schedule relate to arbitration in suits. Paragraphs 17 to 19 relate to agreements to refer made when no suit is pending, and their enforcement by the Court. Paragraphs 20 and 21 deal with arbitration without the intervention of a Court.

Paragraph 17 in so far as it is material for the purpose of this case runs as follows :

> " (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.
>
> (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator."

Paragraph 19 is next relevant. It says :

> " The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon."

Of such " foregoing provisions ", the only one that needs mention is the provision contained in paragraph 5. It provides, *inter alia*, that

> " where an arbitrator dies or refuses or neglects to act or becomes incapable of acting or leaves British India without a prospect of early return, on the application of a party the Court may appoint an arbitrator."

I am clearly of opinion that when the agreement provides for arbitration by named arbitrator or arbitrators, and such arbitrator or any one of such arbitrators is not available on account of death, refusal to act or other reasons before an application is made under paragraph 17, the Court has no power to appoint an arbitrator in his place. The language of paragraph 17, sub-paragraph (4) renders such a conclusion inevitable. It is only if there is no provision in the agreement for the appointment of an arbitrator and the parties cannot agree, that the Court has power to appoint an arbitrator. It follows *a fortiori* that paragraph 19 will not come into play because it refers to an agreement " filed under paragraph 17." This is the view taken in *Salig Ram Bhagat Ram* v. *Kishan Singh Sant Ram*[1] and *Tara Prasad Baliasey* v. *Baijnath Prasad Baliasey*[2].

This case, however, cannot be disposed of on this ground because when the application under paragraph 17 was filed, Ramalingayya, the arbitrator appointed under the agreement, was alive. He died nearly a year after the institution of the application, *i.e.*, on 19th July, 1943. According to the decision of this Court in S.A. No. 444 of 1945, the application, registered and numbered as a suit, was wrongly rejected by the Subordinate Judge. It is a well-established rule that no party should suffer on account of the mistake of the Court. It has now been found that there was no sufficient cause shown by the appellant why the agreement should not have been filed on the date on which the application was made. The Court was therefore bound to make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, *viz.*, Ramalingayya. This

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1. (1938) I.L.R. 20 Lah. 23.
2. (1940) I.L.R. 19 Pat. 927.

case should therefore be decided on the footing that there was a valid order of reference to him and thereafter he died.

The question, therefore, is whether the provisions in paragraph 5 for the appointment of an arbitrator by Court in the place of a deceased arbitrator can be held to be applicable to the case. This depends ultimately on the construction of the particular agreement sought to be filed. This is Ex. P-2. It is executed in favour of Nalam Ramalingayya and runs as follows :

> " Since partition of the moveable and immoveable properties belonging to our family has not been settled, we are disputing. Further, the disputes relating to the trade and cultivation carried on jointly by Satyanarayanamurthi and Krishnamurthi, out of us, have not been settled. Hence, assuring you that all of us shall abide by the award given by you, that we shall all abide by your award as final, this panchayati muchilika has been executed with the consent of all of us."

The question resolves itself into a question of construction, *viz.*, whether the provisions in paragraph 5 for the appointment of an arbitrator in the place of the arbitrator appointed under the agreement is consistent with the agreement. I consider that it is not. It is not necessary to decide whether there is any subtle distinction between the words " so far as they are consistent with " in paragraph 19 and the words " so far as they are not inconsistent with " which occur in the corresponding section 326 of the Code of 1859. Muthuswami Aiyar, J., in *Bala Pattabhirama Chetti* v. *Seetharama Chetti*[1], evidently was of the view that there was no distinction and the words mean " in the absence of anything to the contrary ". If at all, the words " so far as they are consistent with " emphasise the importance to be attached to the provisions of the agreement which should be the governing factor. I am of the opinion that if the intention of the parties as expressed in the muchilika in this case is to be bound by the decision of a particular arbitrator, it follows that any provision which enables the Court to appoint another arbitrator would not be consistent with the agreement. The choice of a particular arbitrator by the parties is the result of personal confidence and trust in his knowledge, character and qualification. I am not able to hold that the question of the personnel of the arbitrator is a subsidiary and incidental matter. An agreement to refer to arbitration under paragraph 1 when a suit is pending stands on a different footing. That paragraph in general terms provides that where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced apply to the Court for an order of reference. The parties, when they so agree, are aware that the provisions in paragraphs 2 to 16 of the second schedule would apply to the proceedings following such an agreement. On the other hand, when parties merely agree to refer the disputes between them to arbitration, it cannot be said that they contemplate at that stage proceedings in Court to enforce it. Without the intervention of Court, an award can be made and it is only thereafter that a person interested in the award may apply to the Court to have the award filed. The parties must be presumed to intend that the terms of the agreement would primarily govern the arbitration.

There are cases in which the agreement may disclose a general intention to have the disputes decided by arbitration without emphasis on the particular individual or individuals as arbitrators. As observed by Henderson, J., in *Rajani Kanta Karati* v. *Panchanan Karati*[2],

> " an agreement to have a dispute settled by one or more individuals is one thing ; an agreement to go to arbitration rather than to litigate in the Courts is quite another."

Where by agreement parties decide to settle disputes by the arbitration of ascertained persons without the intervention of the Court, the Court has no power under paragraph 5 to direct the appointment of a new arbitrator in the place of one declining to act.

It is now necessary to refer to the two decisions of this Court between which, the learned Judges, who made the order referring the case to the Full Bench, thought

1. (1894) I.L.R. 17 Mad. 498. 2. (1937) I.L.R. 2 Cal. 434.

there was a conflict. In my opinion, on a close analysis of the facts of the two cases, there is no irreconcilable conflict between the two decisions. In *Bala Pattabhirama Chetti* v. *Seetharama Chetti*[1], three brothers entered into an agreement referring the matters in difference between them to two named arbitrators and an umpire for decision. The agreement was filed in the District Court of Coimbatore under section 523 of the Civil Procedure Code, 1882, which corresponds to paragraph 17 of the second schedule, and the Judge made an order of reference in accordance therewith. But one of the two arbitrators refused to act as arbitrator and the District Judge appointed another in his place under section 510 of the Code of 1882, corresponding to paragraph 5 of Schedule II. It was urged that as one of the arbitrators refused to act, the agreement became inoperative. The learned Judges, Muthuswami Aiyar and Best, JJ., negatived this contention. In *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*[2], the facts were entirely different. There, the parties agreed to have their disputes relating to the partition settled by three specified arbitrators. During the course of arbitration proceedings, one of the arbitrators died. Thereafter, one of the parties filed a suit for enforcement of the arbitration and for the appointment of a fresh arbitrator in the place of the deceased one. It was held by Ananthakrishna Aiyar and Sundaram Chetti, JJ., that the agreement became inoperative and came to an end on the death of the arbitrator and it could not thereafter be filed in Court under paragraph 17 of Schedule II of the Civil Procedure Code and that paragraph 19 would apply only after the order of reference had been made under paragraph 17. It is clear that while, in the earlier case, the appointment of a new arbitrator was after the order of reference had been made, in the later case the arbitrator died before an application under paragraph 17 was made to the Court. There is therefore no conflict between he actual decisions in the two cases.

There are several observations in the course of the judgment of the two learned Judges in *Narayanapppa's case*[2], which indicate that they were not in agreement with the view taken by the learned Judges in *Bala Pattabhirama Chetti* v. *Seetharama Chetti*[1], as to the effect of the words "so far as they are consistent with any agreement so filed" in paragraph 19 in regard to an agreement to refer to the arbitration of specified person or persons. Ananthakrishna Aiyar, J., says at page 478,

> "As we construe the agreement before us, the provisions of the second schedule are not consistent with the agreement regarding the appointment of fresh arbitrators by Court. The agreement was to refer to the arbitration of three specified persons. There is no provision as to what is to happen in case any of the three died."

Sundaram Chetti, J., at page 485 observes,

> "If . . . . . the parties wanted to abide by the decision of all the three specified arbitrators, any reference made by the Court to two of them only, or after substituting a new arbitrator in the place of one who subsequently died, would not be valid as it would not be consistent with the provisions of the agreement."

I respectfully agree with these observations. On a construction of the agreement in question in this case, I am of the opinion that the provisions in paragraph 5 for the appointment by Court of a new arbitrator would not be consistent with the agreement. The lower appellate Court erred in directing a new arbitrator to be appointed.

It only remains to consider the ruling of the Judicial Committee in *Sadiq Hussain* v. *Nazir Begum*[3]. In that case, there was a suit for the administration of the estate of Aga Hasan Khan which was settled by a compromise in terms of which a decree was made. The terms of the decree provided for the allocation of properties between the parties to be made by arbitrators nominated by the parties. The matters were referred to the arbitrators. But one of them refused to act. The District Judge, in the exercise of his discretion under section 510 of the Code superseded the arbitration and himself determined the matters submitted to the arbitrators. It was held by the Judicial Committee that the District Judge should, under

1. (1894) I.L.R. 17 Mad. 498.
2. (1930) 60 M.L.J. 676 : I.L.R. 54 Mad. 469.
3. (1911) 21 M.L.J. 1151 : L.R. 38 I.A. 181 : I.L.R. 33 All. 743 (P.C.).

section 510, have appointed a new arbitrator, which he had power to do notwithstanding that the arbitrator refusing to act had not first consented to do so. I agree with Ananthakrishna Aiyar and Sundaram Chetti, JJ., that all that was decided in that case was that the expression "refusal to act" includes the case where an arbitrator never accepted the arbitration and is not confined to the case of an arbitrator accepting the arbitration but subsequently refusing to act. A decree had been passed by Court on a compromise which was to be worked out by arbitrators. Substantially, there was an order of reference by Court on the agreement of parties. I do not think any assistance can be derived from this decision in deciding the present case, nor do I think that the view taken by the learned Judges in *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*[1], of this decision of the Judicial Committee requires reconsideration.

In the result, the appeal is allowed and the suit dismissed with costs throughout.

The Chief Justice.—I agree and have nothing to add.

Yahya Ali, J.—I agree.

K.S. ——— *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD SIMONDS, MR. M.R. JAYAKAR AND SIR JOHN BEAUMONT.

Lala Lachhman Das .. *Appellant**

v.

Commissioner of Income-tax, Punjab, N.W.F. and Delhi Provinces, Lahore .. *Respondent*

Hindu Law—Joint family—Coparcener—Right to own separate property in his individual capacity—Partnership between a coparcener and the karta of the joint family representing it—Validity—Income-tax Act (XI of 1922), *section* 2 (6-*B*).

An individual coparcener of a Hindu joint family, while remaining joint, can possess, enjoy and utilise, in any way he likes, property which was his individual property, not acquired with the aid of or with any detriment to the joint family property. He can enter into contractual relations with others, including his family, so long as it is represented in such transactions by a definite personality like its manager. In such a case he retains his share and interests in the property of the family, while he simultaneously enjoys the benefit of his separate property and the fruits of its investment. To be able to do this, it is not necessary for him to separate himself from his family.

Hence, there can be a valid partnership between the karta of a Hindu joint family representing it on the one hand and a member of that family in his individual capacity on the other.

Rai Bahadur Lokenath Prasad Dhandhania v. *Commissioner of Income-tax, Bihar and Orissa,* (1940) 8 I.T.R. 369, distinguished.

For the purposes of such a transaction effected through the medium of its karta, the Hindu joint family is an entity capable of being represented by its manager.

Sir Thomas Strangman, K.C. and *A. G. P. Pullan* for Appellant.

J. Millard Tucker, K.C. and *J. U. R. Jayakar* for Respondent.

Their Lordships' Judgment was delivered by

M.R. JAYAKAR.—This is an appeal under the provisions of section 66-A of the Indian Income-tax Act, 1922, from a judgment and decree of the High Court of Judicature at Lahore dated 8th April, 1944, delivered and passed on a reference made by the Income-tax Appellate Tribunal, Punjab, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as subsequently amended and hereinafter referred to as " the Act."

The year of assessment concerned is 1938-1939. The question referred to the High Court by the Income-tax Appellate Tribunal (hereinafter called " the Tribunal ") was as follows :—

1. (1930) 60 M.L.J. 676 : I.L.R. 54 Mad. 469.

* P.C. Appeal No. 65 of 1946. 29th July, 1947.

"Whether in the circumstances of this case, there could be a valid partnership between Lachhman Das as representing a Hindu undivided family on the one hand and Daulat Ram, a member of that undivided Hindu family in his individual capacity, on the other ?."

This question was decided by the High Court in the negative—thereby reversing the decision of the Tribunal dated 8th September, 1942.

A Hindu named Tulsi Ram had two sons, Chunilal and Lachhman Das (the appellant). Chunilal had three sons and Lachhman Das had seven sons, two of whom were named Daulat Ram and Kanhaya Lal. Shortly before his death in 1930, Tulsi Ram made a gift of Rs. 30,000 to Daulat Ram. Daulat Ram deposited this sum at interest with the firm of the joint family carried on by Chunilal and Lachhman Das. The family was governed by the Mitakshara Law.

In or about 1938, a partition took place between Chunilal and his sons on the one hand and Lachhman Das and his sons on the other. Lachhman Das and his sons, however, remained joint. Daulat Ram was repaid his deposit, which, with interest, had increased to Rs. 48,000, and this sum he invested in certain mills called the Indian Woollen Textile Mills. It is undisputed that this sum was his separate property. It has been found as a fact by the Tribunal and that question is not now before this Board that the mills were the property of a partnership consisting of the undivided family of Lachhman Das and his sons of the one part and Daulat Ram in his individual capacity of the other part. In the assessment for the year 1938-39 on the appellant the question arose whether for the purposes of such assessment the mills could be held to belong to the joint family of the appellant and his sons or to a partnership consisting of the joint family of the one part and Daulat Ram and Kanhaya Lal of the other. In his assessment order dated 11th July, 1941, the Income-tax Officer, Amritsar, held that the mills belonged to the joint family and that the sum of Rs. 48,000 should be treated as a loan by Daulat Ram to the family. The assessment was made accordingly. The appellant appealed against the order to the Appellate Assistant Commissioner of Income-tax, who, by his order dated 1st November, 1941, upheld the order of the Income-tax Officer. The appellant thereupon appealed to the Tribunal against this order of the Appellate Income-tax Commissioner. The contention that Kanhaya Lal was a partner, which had been urged in the previous proceedings, was given up at the hearing. By its order of 8th September, 1942, the Tribunal allowed the appeal, holding that the mills belonged to a partnership consisting as stated above. The Tribunal held that Daulat Ram received as aforesaid by a gift from his grandfather as early as 1929-30 a sum of Rs. 30,000 which he at first invested in the joint family business and subsequently, when it had increased to Rs. 48,000, he invested it in the mills. This investment has all along been treated by the Income-tax Department as the individual asset of Daulat Ram, and the interest earned on that amount from the business had been included in hi separate assessment and had been allowed as such in the assessment of the mills for 1938-39. The Tribunal went on to add that, in view of this treatment of the capital as well as the interest, they found it difficult to appreciate the conclusion of the Income-tax authorities that Daulat Ram could not be deemed to have any separate interest in his individual capacity as a partner in the mills. There was no evidence whatever, they added, to show that either the capital or the interest was blended with the joint family property or its income or merged in one general account. On the other hand, it is common ground that in the account of the mills the investments of the family and the interest derived on their capital were systematically discriminated from those belonging to Daulat Ram.

The Tribunal then referred to certain authorities and distinguished some of them from the case before them, holding, in the result, that the mills belonged to a partnership consisting of the joint family of the one part and Daulat Ram, in his individual capacity, of the other part, and that it was competent for a member of a joint Hindu family to contract in his own individual capacity with the family as a matter of partnership and to maintain a separate interest for himself in that concern. For these reasons they reversed the decision of the Appellate Assistant Commissioner and allowed the appeal.

Application was made by the respondent for a reference to the High Court. In that application it was stated that the following questions of law arose :

"(1) Can there be a partnership within the meaning of section 2 (6-B) of the Indian Income-tax Act, 1922, between a Hindu undivided family as such on the one part and one of its undivided members in his individual capacity on the other part? (2) Even if such a partnership was permissible in law, is there any evidence on record in this case to show the existence of such a partnership between the Hindu undivided family of Messrs. Lachhman Das and Sons (including Daulat Ram) as represented by its Karta Lachhman Das on the one part and Daulat Ram on the other part?"

The form of the second question suggested that for the purposes of the partnership the Hindu undivided family concerned was represented by its Karta Lachhman Das. It appears that, when so stated, the question was subjected to a slight variation from the form in which it was adumbrated before the Income-tax authorities.

The Tribunal drew up a statement of the case and referred it to the High Court. The case set out the facts stated above, and added that the accounts of the business showed that a two-annas share of the profits had been allocated to Daulat Ram; there was no written instrument of partnership, but it had been shown before the Tribunal that a certificate of registration of the firm was granted by the Registrar of Firms under the Income-tax Act on 2nd March, 1938. The case further stated that the suggestion that Daulat Ram was simply a creditor of the mills in his individual capacity was negatived by the fact that, as stated above, a portion of the profit had been allocated to him in accordance with his alleged share in the firm.

The Tribunal proceeded to say that they accepted as a fact and there was evidence to show that Daulat Ram was interested in his own right in the concern, having contracted expressly in his private capacity and having taken care not to merge his interest in that of the joint family of which he was a member. Consequently, the Tribunal held, there could be no legal objection to a valid partnership existing between the Hindu undivided family and one of its members.

Out of the two questions mentioned above, the Tribunal regarded the second question as one of fact, and as it had been decided by the Tribunal as a fact, they declined to refer that question to the High Court. As to the first question, the Tribunal, with the consent of both sides, framed it in the form mentioned at the commencement of this judgment.

The reference came on for hearing before Din Mohammad and Sale, JJ., of the Lahore High Court on 18th April, 1944, and on the same day the judgment of the High Court was delivered, answering the question in the negative and thus reversing the decision of the Tribunal.

Before their Lordships objection was taken to the form of the question as set out above on the ground that in the previous proceedings before the Income-tax authorities the partnership relied upon was between the members of the Hindu family as such on the one hand and Daulat Ram, in his individual capacity, on the other. Their Lordships, however, must accept the question as stated in the case presented for their consideration, whatever its previous form might have been. Their Lordships are therefore concerned in this case only with the validity of a partnership between the Karta of the family representing it on the one hand and a member of that family in his individual capacity on the other. It is unnecessary to consider in this case the question relating to the validity of a partnership between a Hindu undivided family as such of the one part and one of its undivided members in his individual capacity of the other. With reference to the latter kind of partnership, there seems to be some authority favouring the view that such a partnership cannot exist under the rules of Hindu Law, but their Lordships do not propose to deal with that question in this case.

The argument before their Lordships on behalf of the appellant is as follows:

(1) It cannot be doubted that a co-parcener in a joint and undivided Hindu family can enter into contractual relationships with the members of that family while remaining joint with them; and (2) if so, partnership being in its nature a

contractual relationship, there should be, on general principles of Hindu Law, no objection to the validity of such a transaction. This argument was reinforced by another that the rules of Hindu Law permit the formation of a partnership between the managing member of a Hindu joint family on the one hand and a stranger on the other. In such a case, it is argued the family as a unit does not become a partner, and consequently the objections to the formation of such a partnership due to the fleeting and changeable nature of a joint Hindu family do not arise ; such of its members as in fact enter into contractual relations with the stranger alone become partners, and the partnership would be governed by the Indian Partnership Act.

Authority for this proposition, it would appear, was to be found in Mayne's Hindu Law, 9th Edition, page 398 and in a decision of this Board, *P.K.P.S. Pichhappa Chettiar* v. *Chokalingam Pillai*[1], where this passage from Mayne was approved and relied upon. The Tribunal relied upon Mayne's authority but the High Court distinguished it on the ground that Daulat Ram, though he might have made a contribution in his individual capacity from his separate funds, could not be regarded as a stranger so long as he continued his connection with his undivided family in the capacity of a co-parcener. The term "stranger," the High Court said, implies an idea of being foreign or alien to the family and this description cannot fit in with a co-parcener of the same family "so long as he is a composite member thereof."

After careful consideration, their Lordships cannot accept this view and on general principles they cannot find any sound reason to distinguish the case of a stranger from that of a co-parcener who puts into the partnership what is admittedly his separate property held in his individual capacity and unconnected with the family funds. Whatever the view of a Hindu joint family and its property might have been at the early stages of its development, their Lordships think that it is now firmly established that an individual co-parcener, while remaining joint, can possess, enjoy and utilise, in any way he likes, property which was his individual property, not acquired with the aid of or with any detriment to the joint family property. It follows from this that to be able to utilise this property at his will, he must be accorded the freedom to enter into contractual relations with others, including his family, so long as it is represented in such transactions by a definite personality like its manager. In such a case he retains his share and interests in the property of the family, while he simultaneously enjoys the benefit of his separate property and the fruits of its investment. To be able to do this, it is not necessary for him to separate himself from his family. This must be dependent on other considerations, and the result of a separate act evincing a clear intention to break away from the family. The error of the Income-tax Officer lay in his view that, before such a contractual relationship can validly come into existence, the "natural family relationship must be brought to an end." This erroneous view appears to have coloured his and the subsequent decisions of the Income-tax authorities.

In this view of the Hindu Law it is clear that if a stranger can enter into partnership, with reference to his own property, with a joint Hindu family through its Karta, there is no sound reason in their Lordships' view to withhold such opportunity from a co-parcener in respect of his separate and individual property.

For the respondent it was argued that the case of a partnership with a stranger can be distinguished on the ground that the Karta's entering into a partnership on behalf of a joint Hindu family is in substance of the nature of an alienation, in so far as it permits the person accepted into partnership to participate in the fruits of the family partnership and to that extent it causes a loss or detriment to the family much in the same way as if the Karta had made a *pro tanto* alienation of the family, property. On this basis, it is argued, that, on general principles of Hindu Law, an alienation may be permitted, in certain events, in favour of a stranger, but not in favour of a co-parcener ; the two cases are therefore distinguishable.

1. (1934) 67 M.L.J. 366 : 36 Bom.L.R. 976 (P.C.).

Dealing with this argument, their Lordships find the analogy remote and fantastic between an alienation of the family property and an acceptance of a stranger to the benefits of a partnership with it. In no sense can such acceptance be regarded as an alienation ; and, further, even if it could be so regarded, it is now established by several rulings, including one of this Board (see *Sardar Bahadur Sir Sunder Singh Majithia* v. *Commissioner of Income-tasx*[1]), that a joint Hindu family can alienate an asset belonging to it to a member of the family without causing a disruption of the family. This case also throws a sidelight upon the question at issue in this appeal in so far as it holds that there is nothing to prohibit members of an undivided Hindu family from entering into partnership in respect of a portion of the joint property which they have partitioned among themselves.

On the respondent's behalf their Lordships' attention was invited to a case (*Rai Bahadur Lokenath Prasad Dhandhania* v. *Commissioner of Income-tax, Bihar and Orissa*[2]), but the facts of that case are clearly distinguishable. The partnership there (as the judgment of the High Court in that case states) was formed between the same individual acting, on the one hand, as the Karta of the joint Hindu family and, on the other, as a partner in his individual capacity. He came to occupy, in the same transaction, two different capacities ; one as representing the interests of the family and the other as representing his private interests. These two capacities might in certain conceivable circumstances be in conflict. The partnership in that case was therefore rightly disallowed.

In conclusion, it was argued for the respondent that a joint Hindu family being, by its nature a frequently changing entity no partnership could be formed with it.

This objection if valid, would be equally operative against a partnership of the family with a stranger, which the authorities prove, and it is practically conceded in this case, can be validly formed. But, apart from this answer, it may be pointed out that though in its nature a joint Hindu family may be fleeting and transitory, it has been regarded as capable of entering, through the agency of its Karta, into dealings with others. Without accepting the view of some eminent Hindu Judges that a Hindu joint family is, in its true nature, a " corporation " capable of a continuous existence in spite of fleeting changes in its constitution, it is enough to state that for the purpose of such a transaction effected through the medium of its Karta, it has been for a long time past, regarded as an entity capable of being represented by its manager. The class of cases, of which the ruling, *Chandrika Prasad Ram Swarup* v. *Commissioner of Income-tax*[3], is an illustration went on a different principle, namely, that a firm, not being recognised as a legal entity, cannot as such enter into partnership with another firm as such. That principle cannot be applicable to a joint Hindu family in transactions where it acts through the agency of its Karta.

For all these reasons, their Lordships' answer is in the affirmative to the question which is before them. The appeal will therefore be allowed, the decision of the High Court reversed and that of the Tribunal restored, and the case will be referred back to the Income-tax authority concerned to be dealt with in the light of their Lordships' answer. The respondent will pay the costs of the appellant here and of the proceedings in India. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant : *Douglas Grant and Dold.*

Solicitor for Respondent : *Solicitor, India Office.*

V.S. *Appeal allowed.*

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1. (1942) 2 M.L.J 761 : L.R. : 69 I.A. 119 : I.L.R. 1943 All. 69 (P.C.).
2. (1940) 8 I.T.R. 369.
3. (1939) 7 I.T.R. 269.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Mohammad Din and others .. *Appellants**

v.

Imam Din and another .. *Respondents.*

Colonisation of Government Lands Act (1912)—*Crown Grants Act* (*XV of* 1895), *section* 3—*Grant of proprietary rights to tenant under the Colony Act of* 1893—*Imposition of condition against alienation* "*without the concurrence of the reversioners*"—*Legality* —*Civil Court*—*Jurisdiction*—*Executive authority acting* ultra vires.

A tenant, the widow of the original grantee, applied for acquisition of proprietary rights in respect of lands granted under the Colony Act of 1893. The application was granted but a condition was imposed that the land should not be alienated during the tenure of the widow "without the concurrence of the reversioners". In a suit challenging the imposition of such a condition as being *ultra vires* the executive authority,

Held, it was not competent for the executive authority under the form of granting proprietary rights to grant something very different and in fact to create an estate of a kind unknown to the law. For the result of a grant with such a condition is to deprive the grantee of proprietary rights of an essential right of property, *viz.*, the free power of disposition, and moreover to fetter it not by an absolute bar against alienation nor by such a bar except with the consent of a particular person, but by a bar against alienation except with the consent of a body of persons presumably altering from time to time and perhaps at no time easily ascertainable. There is no justification for such a condition either in the Colonisation of Government Lands Act or the rules made thereunder. Neither does section 3 of the Crown Grants Act (even assuming it applies to the case) justify such a grant with such a condition imposed. The imposition of the condition was *ultra vires* the executive authority and the condition was void.

Held, further, the Civil Court has power to entertain a suit, in which the question is whether the executive authority has acted *ultra vires.*

King-Emperor v. *Sibnath Banerji*, (1945) 2 M.L.J. 325 : 1945 F.L.J. 222 : L.R. 72 I.A. 241 (P.C.), relied upon.

Chinna Durai for Appellants.

H. J. Umrigar for Respondents.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—This appeal from a judgment and decree of the High Court of Judicature at Lahore affirming a decree and judgment of the Senior Subordinate Judge at Lyallpur raises questions of some importance in regard to the powers of the executive authorities under the Colonisation of Government Lands Act of 1912.

The facts are simple and not in dispute. The lands in question in the case, which are situate in the district of Lyallpur, were at some date not made known to their Lordships granted under the Colony Act, 1893, to one Mokham on what is described as the usual colony tenancy. He died and was succeeded by a son named Jhanda who died without issue and was in turn succeeded by his mother Musammat Hayat Bibi, the widow of Mokham. At some date, which also does not clearly appear, the widow made an oral gift of the land to her son Imam Din. If she had full proprietary rights, she was competent to do so. Her competence has been challenged by the appellants all of whom are collaterals of Mokham under the circumstances which will now be stated.

On the 27th November, 1940, the widow being then the tenant of the land in dispute upon the terms of the tenancy grant applied in accordance with its conditions in the Court of the Collector Lyallpur for the acquisition of proprietary rights therein on payment of the Zar-i-Milkiat or proper purchase money. The Collector who must be regarded as having acted as a Deputy Commissioner made the order asked for and the widow paid the purchase money. The appellants, though it has not been made clear to their Lordships what right they had to be present, appear to have attended before the Collector and opposed the application.

* P.C. Appeal No. 54 of 1946. 24th July, 1947.

And being dissatisfied with his order they appealed to the Commissioner of Multan Division who on the 29th May, 1941, varied the order by imposing the condition that the land should not be alienated during the tenure of the widow "without the concurrence of the reversioners," *i.e.*, the appellants. From this order the respondents in turn appealed to the Financial Commissioner of the Punjab, who on the 4th March, 1942, affirmed the Commissioner's order and rejected the appeal. He observed that the Deputy Commissioner (*i.e.*, the Collector who acted as Deputy Commissioner) ought not to have given permission to acquire proprietary rights but he agreed with the Commissioner that, as the proprietary rights had actually been paid for and the transaction was complete, its repudiation at that stage might involve unnecessary complications. He further said that in the grounds of appeal it had been urged that the Commissioner had acted *ultra vires* in attaching the condition in regard to alienation but that this point had not been argued before him. He thought however that as the Government was not under any obligation to grant proprietary rights it was equally competent to grant proprietary rights subject to conditions and under the Crown Lands Grants Act such conditions were binding on the grantee.

The widow having, as already stated, made a gift to her son Imam Din in the course of the proceedings, he and she on the 23rd March, 1942, commenced the suit, in which this appeal arises, in the Court of the Senior Subordinate Judge, Lyallpur, against the present appellants claiming a declaration that he was the full owner of the land in dispute. This claim, as already pointed out, depended for its validity upon the plea that she had full proprietary rights including an unfettered power of alienation. This could only be so if the Commissioner had no power to vary the Deputy Commissioner's order by imposing the condition already mentioned.

In the suit a number of issues were raised, but in effect only two were argued before their Lordships, *viz.* :—(1) whether the Civil Court had jurisdiction to try the suit and (2) whether the condition against alienation "without the concurrence of the reversioners" was *ultra vires* the Commissioner.

Their Lordships have no doubt that the Civil Court has power to entertain a suit, in which the question is whether the executive authority has acted *ultra vires*. They need do no more than refer to the recent exposition of this subject in *King-Emperor* v. *Sibnath Banerji*[1].

The more difficult question is that which they now proceed to discuss, whether the imposition of the condition in question was *ultra vires* the Commissioner. But before doing so, they will state the course of the suit in the Courts in India. The Subordinate Judge, Lyallpur, first held, and, as their Lordships think, rightly held, that the Civil Court had jurisdiction to try the suit. At a later stage after hearing evidence, to which it is not necessary to refer, he decided that no appeal lay from the order of the Deputy Commissioner to the Commissioner or the Financial Commissioner and that the condition imposed by the Commissioner and upheld by the Financial Commissioner was clearly in excess of their power and *ultra vires*. He held therefore that the widow was competent to dispose of the property and made the declaratory decree as asked.

From this decision the present appellants preferred an appeal to the High Court of Judicature at Lahore. It appears from the judgment of the learned Chief Justice of that Court that at the hearing of the appeal one point only was taken by counsel for the appellants, *viz.*, that the Subordinate Judge was wrong in holding that no right of appeal existed from the order of the Deputy Commissioner. Upon this point the Chief Justice thought that the appeal was well-founded, holding that an appeal from an order granting permission to acquire proprietary rights lay to the superior executive officers. But he thought further that, even if such an appeal lay, the question still had to be decided whether such a condition could be imposed upon the grant of proprietary rights, and upon a consideration of the

1. (1945) 2 M.L.J. 325 : 1945 F.L.J. 222 : L.R. 72 I.A. 241 (P.C.).

question came to the conclusion that the condition was not warranted by the Colony Act or any rules made thereunder and must be treated as void. The decision of the Subordinate Judge was therefore affirmed.

With this conclusion their Lordships agree. They have not had the advantage of seeing the original grant but assume that the Financial Commissioner was correct where he said :

> "The Commissioner has rightly pointed out that the original grant was made on condition that made no provision for the acquisition of proprietary rights."

If so, it would seem that the effect of the Act of 1912 and the Rules issued under it by the Punjab Government under the description :

> "Rules prescribing the conditions on which tenants holding land in the Chenab Colony under statements of conditions issued under Act III of 1893, other than tenants holding on service conditions, may acquire proprietary rights in their holdings"

was to give to the executive officer the absolute right to grant or to refuse to grant proprietary rights to such a tenant. Their Lordships observe that Rule V of the cited Rules is in these terms :

> "An appeal shall lie to the Commissioner from an order of a Deputy Commissioner under these rules refusing to grant proprietary rights. All proceedings under these rules shall be subject to the control of the Financial Commissioner and the Local Government."

The first part of this Rule suggests that the decision of the Deputy Commissioner is of a judicial character, and further suggests that upon the principle "*expressio unius exclusio alterius*" no appeal lies from an order of the Deputy Commissioner granting proprietary rights. But this is not easily reconcilable either with the second part of the Rule which submits all proceedings to the control of the Financial Commissioner and the Local Government or with the general executive character of the proceedings. Their Lordships do not for the reasons presently appearing think it necessary to express any final opinion upon this point. They observe however that a very good reason for giving a right of appeal, where a grant has been refused, but saying nothing about the case, in which it has not been refused, would be that the executive authority would not itself want to appeal from the grant which its own officer had made and that it was never contemplated that third parties would be cited and be concerned to appeal from any order. The conclusion cannot be avoided that in this matter the boundary, often difficult to maintain, between executive and judicial function has not been carefully observed and some confusion has resulted.

But, however this may be, the substantial question, as the Chief Justice observed, still remains, whether the executive authority could lawfully superimpose upon the grant of proprietary rights such a condition as was here imposed. Upon this question their Lordships concur in the reasoning and conclusion of the Chief Justice. They would not lay too much stress on the fact that the widow had in fact paid a purchase-price based on the acquisition of full proprietary rights whereas the result of the condition was that she got something different and less valuable. They would assume that the executive authority would not hold her to such a bargain but would, if she wished, repay her the money and restore her to her former position. The real question is whether it was competent for the executive authority under the form of granting proprietary rights to grant something very different and in fact to create an estate of a kind unknown to the law. For the result of a grant with such a condition is to deprive the grantee of proprietary rights of an essential right of property, *viz.*, the free power of disposition, and moreover, to fetter it not by an absolute bar against alienation nor by such a bar except with the consent of a particular person, but by a bar against alienation "except with the concurrence of the reversioners," a body of persons presumably altering from time to time and perhaps at no time easily ascertainable. Their Lordships do not find any justification for such a condition in the Act or any Rules that have been brought to their notice.

It was urged on behalf of the appellants that such a condition was justified by section 3 of the Crown Grants Act (Act XV of 1895). Their Lordships will

assume without deciding the question, which is at least arguable, that that Act applies to the acquisition of proprietary rights under the Colony Acts. Section 3 is undoubtedly very general in its terms. It provides that :

"all provisions restrictions conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary notwithstanding."

But for the reasons given by the Chief Justice this does not appear to justify a grant with such a condition imposed. For here the specific subject-matter of the grant is "the proprietary rights." That and nothing else may be granted or refused. To purport to grant "proprietary rights" but to withhold an essential proprietary right, *viz.*, the free power of alienation, is neither the one thing nor the other. The withholding of such a right may be referred to as a condition, but its effect, as already stated, is to create an estate unknown to the law and to grant not "proprietary rights" but something less which is not susceptible of terms of legal definition. Their Lordships think that the original grant by the Deputy Commissioner, who clearly acted within his competence, should stand and the so-called condition imposed by the superior executive authority, which was in their view incompetent, should be disregarded.

For these reasons they are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants must pay the costs of this appeal.

Solicitors for Appellants : *Hy. S. L. Polak & Co.*

Solicitors for Respondents : *T. L. Wilson & Co.*

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

W. Jayaraghavan .. *Appellant**

v.

The Leo Films .. *Respondent.*

Damages—Breach of contract—Picture under production—Agreement regarding taking up of distribution rights—Failure to advance monies—Producer being otherwise financially in need—Picture produced with other funds—Distribution rights assigned to different party for higher sum—Damages for breach of agreement to advance monies—Measure—Contract Act (IX of 1872), section 73—Interference by the appellate Court with the assessment of damages by the trial Court—Principles.

Under section 73 of the Contract Act proof of damage is necessary to enable recoverability of damages.

The respondent, who was a man without finance, embarked on the production of a film and in his turn entered into a contract with the appellant by which the latter was to make certain payments of rent in advance in lieu of his being given the right to exploit the picture when produced in certain localities. The appellant made an initial payment as advance but failed to pay further instalments. The respondent treated the appellants' failure as repudiation of the agreement entitling him to terminate it. The appellant sued the respondent who had produced the picture for specific performance of the agreement, for damages for wrongful repudiation of the contract and for return of the amount paid by him as advance. The respondent counter-claimed for damages. It was shown that though the respondent was handicapped in producing the film on account of the default of the appellant, and that he had to borrow monies on interest, the respondent was without any finance of his own and that after he produced the picture he gave the distributing rights allotted to the appellant to another party for a sum larger than that offered by the former. The appellant's claim for specific performance and damages was negatived but the advance amount was directed to be refunded to him and the respondent was awarded Rs. 5,000 being the damages claimed by him. On an appeal against the question of damages,

Held, that the proper measure of damages was only the loss sustained by the respondent by reason of the damage which naturally flowed as a consequence of the appellant's breach of his agreement to pay the rental instalments in time. He was not entitled to recover in respect of every misfortune indirectly occasioned to him. Under the circumstances of the case the damages payable should be fixed at Rs. 250.

* O. S. A. No. 32 of 1946. 28th November, 1947.

An appellate Court is always most reluctant to interfere with an assessment of damages by a learned Judge of the Trial Court. It would do so only when it is satisfied that the amount of damages is such that the amount is one which is beyond reasonable expression of the damage sustained.

Appeal against the decree and judgment of Clark, J., dated 22nd July, 1946, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 22 of 1944.

V. Ramaswami Aiyar for Appellant.

T. K. Subramaniam Pillai for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal by the plaintiff against the amount of damages awarded to the defendants upon their counter-claim. The plaintiff (hereafter called "the appellant,") carries on business as a film distributor. The defendant firm, of which Mr. C. S. Jagannathan is the managing partner (to whom it is convenient hereafter to refer as "the respondent") were producers of a Tamil talkie picture named "Poompavai." Whilst the film was in course of production, and before it had been completed, a contract dated 6th May, 1943, was made between the respondent (therein called "the lessor") and the appellant (therein called the "lessee") whereby it was agreed *inter alia* that (1) the respondent should lease to the appellant the rights of exploiting the picture "Poompavai" within the districts specified in the agreement, including the City of Madras, for five years from the date of delivery of the picture; (2) the appellant to pay to the respondent, as rent, the sum of Rs. 32,000 of which Rs. 2,016 was payable on the date of the agreement, three sums of Rs. 5,000 each payable on 16th May, 16th June and 16th July, 1943, and the balance of Rs. 14,984 on delivery of two copies of the picture; and (3) in case of any infringement by either party, the defaulter should compensate the other for the loss sustained.

The appellant duly made the first payment of Rs. 2,016 but he failed to pay any instalment thereafter, the first default taking place on 16th May, 1943, when a sum of Rs. 5,000 then due was not paid. The respondent treated the appellant's failure as a repudiation of the agreement, thereby entitled him to terminate it, which accordingly he did. The appellant instituted a suit, C. S. No. 22 of 1944, against the respondent claiming specific performance of the agreement and damages for wrongful repudiation and for return of the amount of Rs. 2,016 paid on or about the 8th May, 1943. The respondent counter-claimed for damages, alleging they amounted to Rs. 20,000, but he limited his claim to Rs. 5,000. The suit was tried by Chandrasekhara Aiyar, J., sitting in the exercise of ordinary original civil jurisdiction of this Court, who held that the respondent was in breach and the appellant was not. On appeal, that decision was set aside; the appellate Court found that the appellant was at fault and the respondent was justified in terminating the contract and directed that the counter-claim be remanded to the Original Side of this High Court to inquire into the damages and to pass a decree for the amount found due to the respondent. The appellate Court upheld a finding that the appellant was entitled to return of the sum of Rs. 2,016. The latter finding clearly was pursuant to the provisions of section 64 of the Indian Contract Act.

Clark, J., inquired into the amount of damages recoverable by the respondent and adjudged the amount to be a sum of Rs. 5,000. This is the appellant's appeal against the amount of damages so awarded; that is the sole question for consideration and no other question arises.

The respondent was the only witness who was called. A perusal of his testimony does not reflect that it was very satisfactory or dependable. He said the cost of the picture was Rs. 3,00,000, its production commenced in September 1942 and was completed in August 1944. By May 1943 only Rs. 10,000 had been obtained towards the heavy cost of making the picture, which sum was provided by the respondent himself, that amount was exhausted by May 1943, when the agreement was made with the appellant, and when he paid the sum of Rs. 2,016. At that

period, the respondent was under obligation to pay salaries and provide board and lodging for the artists who had been engaged and for use of the studio. The complaint made is that production was held up solely because the appellant failed to make his payment of Rs. 5,000 on the 16th May, and the other two instalments of like amounts on 16th June and 16th July. In July, the respondent entered into a very satisfactory arrangement and contract with one S. Venkataraman Chettiar, who subsequently provided all the finance which was needed in consideration of which he was given the exploitation rights in a large part, if not throughout the whole of the Presidency of Madras and other places where the picture would be acceptable for exhibition. The main complaint which the respondent appeared to make in his evidence was that through the appellant's default he was unable to purchase raw films ; but nevertheless his accounts show that a sum approaching Rs. 3,000 was spent for such films in April, 1943. In cross-examination, the respondent was forced to admit that he obtained from Venkataraman Chettiar a sum of Rs. 5,000 on the 17th June, and another sum of Rs. 2,500 on the 26th June, for which no interest was payable. He added, that he borrowed Rs. 6,000 between May and June from a man named Sanjeeva Naidu at interest.

In regard to interest, there is one entry in his books, dated November 1944, recording a sum of Rs. 1,266 paid for interest ; but there is no information in respect of what principal that amount was paid. The respondent said that the rate of interest which he had to undertake to pay was 12 per cent. per annum. It is quite clear that from about the middle of June, when Venkataraman Chettiar became concerned with the production of the film and provided the necessary finance, there was no lack of funds. The respondent said that between May 16, when the appellant made his first failure to pay an instalment, and 27th July, following a sum of Rs. 20,000 was paid for salaries and board and lodging for the artists. It would seem that that is the sum which was reflected in the counter-claim as the amount of damages actually sustained ; but it is beyond doubt, to some extent at any rate, that production was going on during that period.

It is manifest that the respondent commenced production of the film, which he says cost about Rs. 3,00,000 when he had not the necessary capital available and that the money which he had was totally inadequate for the purpose. As mentioned earlier, between September 1942 and May 1943, only Rs. 10,000 was available. The respondent apparently took in two partners, who each provided Rs. 10,000 but that was subsequent to July 1943. It is perfectly clear that, even if the appellant had fulfilled his obligations and made payments totalling Rs. 17,000 by the middle of July, instead of providing Rs. 2,000, even so, the film could not have been completed, and the respondent could not have been able to continue with its production without the intervention and the help afforded by Venkataraman Chettiar. Until the advent of Venkataraman Chettiar's connection, production of the film went on in a very lethargic manner ; whilst the appellant's money might have assisted the respondent to some extent, it could have done nothing more, but large amounts of other finance would have been needed.

The sole matter which arises, as pointed out above, is the question of the amount of damages. The appellant suggests that the learned Judge awarded a sum which is out of all proportion to the loss which is properly recoverable. The agreement provides that in the event of a breach, the party in default should compensate the other for the loss sustained. That term in the agreement, it is not suggested, gives anything more than what is provided by section 73 of the Indian Contract Act. All that the appellant derived under the agreement was to have two copies of the film for exhibition within the specified territories in consideration for which he was under obligation to pay a rent of Rs. 17,000 in advance and the balance of Rs. 15,000 when the film was delivered to him. No date for delivery was specified, and therefore had the contract been fulfilled by the appellant, he could not have insisted upon delivery save after expiration of a reasonable time, whatever that might be. The contract contains no provision, and further, there is no evidence, reflecting

that any specific circumstances were brought to the notice of the appellant, at the date the agreement was made, by which his responsibility for damages was to be larger than that which ordinarily flowed from a breach committed by him. It seems to me that the appellant was in the identical position of a person prepared to become a tenant of an unbuilt house and to pay rent for it in advance to the landlord; the landlord himself outside the agreement with the potential tenant, utilising the receipts, by way of advances of rent, to meet the cost of erection of the house. In those circumstances, if the landlord defaulted in payment to his contractors by reason of non-payment of advance rent, could it be suggested that the tenant was obliged to accept responsibility for any loss occasioned to the landlord by reason of being unable to complete the building of his house? In the present instance, by reason of the appellant being agreeable to pay rent in advance for an unproduced film and to be content to take it, or copies of it, when the film was finished, and because he failed to pay advances of the rent, is his liability for loss accruing to the respondent, owing to his own financial embarrassment, to be an additional responsibility? If that be the position, then, it seems to me, that no one will enter into an agreement with a producer, who contemplates making a film, to provide him with rent in advance for copies of it before it is completed, if the renter finds that, thereby, he must shoulder serious and onerous obligation in the event of failing to make payment for the rent in advance.

The present circumstances arise solely out of the incident that the respondent was a man who had no finance but who embarked upon an undertaking at a time when he had not the wherewithal to carry it out; and to enable him to do so, he entered into a contract with the appellant by which he would obtain, if the contract had been fulfilled, paym(nt of rent in advance and to use it to discharge his own personal obligations. It is said that because of the appellant's failure, heavy loss has been sustained by the respondent, for which the appellant must be held responsible. That argument can be made only by reason of the financial embarrassment of the respondent and his embarking upon his proposition in that condition. If the respondent had been a man of substance and of financial stability, the failure of the appellant to make his rental instalments in due season, would have occasioned no loss whatever to the respondent.

Reference to the authorities is now convenient. It is not suggested that the law in England is different to that in India. It is to be observed, however, that, by section 73 of the Contract Act, in India, in the absence of proof of damage, nominal damages are not recoverable but that proof of damage is necessary to enable recoverability. It is instructive to refer to the relevant decisions given in England.

In *Western Wagon and Property Co.* v. *West*[1], it was observed by Chitty, J., at page 277 that

"If *A* agrees to lend *B* £100 at interest for a week, and makes default, and *B*, within a few minutes after the time at which £100 ought to have been lent, obtains from his bankers a loan of £100 at the same rate of interest and for the same period of time, the damages would be merely nominal."

In the *South African Territories, Ltd.* v. *Wallington*[2], affirmed by the House of Lords (1898 A.C. 309) there was a breach of contract to take debentures in a company; it was held that the damage for the breach was the loss sustained and not the sum agreed to be lent; at page 695, in the judgment of the Court of Appeal, the observations of Chitty, J., in *Western Wagon and Property Co.* v. *West*[1], were cited with approval, and at page 696 it is observed:

"The measure of the damages is the loss sustained by the borrower through breach, the rule in *Hadley* v. *Baxendale*[3], being applied when the circumstances justify its application. If the intended borrower, being a man of good credit, can readily obtain the loan from another person on the same terms, the damages would be nominal. If he cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, the damages would be greater

1. (1892) 1 Ch. 271.
2. (1897) 1 Q.B. 692.
3. (1854) 9 Ex. 341.

and might be very substantial. The burden of proving the amount of the loss sustained rests upon the plaintiff."

In *Prehn* v. *Royal Bank of Liverpool*[1], Martin, C.B., observed as follows at pages 99-100:

"Now, with respect to damages in general, they are of three kinds. First, nominal damages; which occur in cases where the Judge is bound to tell the jury only to give such; as, for instance, where the seller brings an action for the non-acceptance of goods, the price of which has risen since the contract was made. The second kind is general damages, and their nature is clearly stated by Cresswell, J., in *Rolin* v. *Steward*[2] They are such as the jury might give when the Judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man. Thirdly, special damages are given in respect of any consequences reasonably or probably arising from the breach complained of."

Reference can now be made to two decisions in India. *Girish Chandra Das* v. *Kunj Behari Malo*[3] was a case where a sub-tenant failed in his obligation to pay to the superior landlords rent of occupied premises and in consequence, it was alleged, his immediate landlords were unable to meet their own obligations to their superior landlord resulting in the premises being lost to them; in an action by the intermediate landlords damages were sought to be recovered from the sub-tenant in respect of the loss of the premises; in his judgment, Sir Francis Maclean, C.J., observed at page 689 as follows:

"His (the sub-tenant's) damages for the loss of the plaintiffs' property, which was attributable to their own default, are too remote. It was entirely their fault that they allowed the property to be sold. The plaintiffs were primarily liable for the rent, and directly they found that the defendant No. 1 had broken his covenant and had not paid the rents, they ought to have paid it. If they had done so, the property would not have been sold and they would have sustained no loss. I do not think that the loss, which they sustained, and which is attributable to their own default, is the natural consequence of the default of the defendant No. 1 to comply with his covenant. It is reasonably clear, if we look at section 73 of the Indian Contract Act, that the plaintiffs were only entitled to compensation for any loss or damage, which naturally arose in the usual course of things from the breach of the contract."

In *Narain Das* v. *Basant Lal*[4], it was observed in the judgment of a Bench of the Allahabad High Court,

"The law cannot recognise any loss which does not naturally follow from the breach of the contract between the parties."

Before leaving the citation of authorities, it is helpful and illuminating to refer to the observations of Lord Wright in *Liesbosch, Dredger* v. *S. S. Edison*[5], ordinarily known as the *Edison case*, at page 460:

"The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes,' or consequence of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the ship owner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."

Now, returning to the facts and circumstances of the present case. The appellant was clearly at fault, and his act was wrongful in failing to observe an obligation which he had undertaken in the agreement of the 6th May, 1943, to pay sums of Rs. 5,000 on 16th May, 16th June and the 16th July. But those payments were no more than advances of rent for a film which was not produced and the date of its completion and its delivery were unstated and unsettled. There is no doubt that the respondent was hoping to utilise the moneys, which he expected to obtain from the appellant, to meet the production charges. But there is nothing in the contract or in any part of the evidence which in any way reflects that it was brought to the notice of the appellant that there would be, in consequence of his non-payment any interruption in the production of the film, or, if there was, that he would be responsible for it. Incidentally, it is to be observed that the appellant was paying a sum of Rs. 32,000 for several territories, including the city of Madras;

1. (1870) 5 Ex. Cases 92.
2. (1854) 14 C.B. 595 at 605: 139 E.R. 245.
3. (1908) I.L.R. 35 Cal. 683.
4. (1913) 18 I.C. 449 at 450.
5. (1933) A.C. 449.

subsequent to the termination by repudiation of the agreement, the respondent resold or relet, whichever may be the correct expression, the territory of Madras city alone for a sum of Rs. 39,000. The consequences, which the respondent alleges, fell upon himby reason of the appellant's failure were not such as ordinarily flow from such failure.

In May, the appellant failed to pay Rs. 5,000 but it was in that month or early in June that the respondent was able to borrow Rs. 6,000 from Sanjeeva Naidu at interest, and in June, when there was another default, he had been successful in obtaining Rs. 7,500 advanced by Venkataraman Chettiar towards the production costs without having to pay interest; by the end of the month of July, all financial worry went, since Venkataraman Chettiar was there with such sums, large or small, as might be required. In argument, it was suggested that by reason of the appellant's breach, the respondent was at a disadvantage in selling or letting territories for the exploitation of the film. That may or may not be, but in his evidence the respondent made no complaint about that, and in no circumstances is it a matter which can be taken into account in the assessment of damages.

The respondent is entitled to recover a sum in money, so far as it can represent the loss which he sustained, by reason of the damage which naturally flowed from the appellant's breach. He certainly is not entitled to recover in respect of every misfortune indirectly occasioned to him. That is manifested clearly in the succinct observations of Lord Wright in the *Edison case*[1]. At the same time, the respondent must have sustained some loss. At any rate, he was without money for some period, and when he obtained it, in the first instance from Sanjeeva Naidu, he had to pay interest on it, he said, at 12 per cent. per annum; whereas no interest would be payable upon the instalments which the appellant was under obligation to pay.

Assessment of damages in a matter of this kind is always difficult, and I agree with the learned trial Judge that one would have been most happy to have had the advantage of the assistance of a jury, whose opinion would be valuable in the ascertainment of damages; but that is denied to Judges in this country in civil cases.

An appellate Court is always most reluctant to interfere with an assessment of damages either by a Jury or, as in this case, by a learned Judge sitting alone. And it does so only when it is satisfied that the amount of damages is such that, a jury of 9 or 12 reasonable men could not possibly have arrived at the amount awarded, or, in the case of a Judge sitting alone, the amount is one which is beyond reasonable expression of the damage sustained. Bearing that in mind, I have, nevertheless, come to the conclusion that the amount which the learned Judge awarded in this case was incorrect. I think he took into consideration matters which were beyond those which should have been taken into account. I have ventured to set out the principles which should be followed in the assessment of damages in a matter of this sort, and that although perhaps the injured party has, in fact, been occasioned further loss, it is not a loss which can be recovered from the party at fault. Taking into account every aspect, including the interest payable upon money which had to be obtained in the absence of payments which the appellant was under obligation to make, I have come to the conclusion that the correct sum to have been awarded was Rs. 250. It follows that the appeal will be allowed with costs of the appellant. The order and decree of the learned Judge will be set aside and a decree for Rs. 250 will be substituted in place of Rs. 5,000 with costs upon that amount, in so far as they are recoverable in respect of a counter-claim.

Bell, J.—I agree. *Appeal allowed and decree modified.*

B.V.V.

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1. (1933) A.C. 449.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

S. K. Ramaswami Goundan .. *Appellant**

v.

S. N. P. Subbaraya Goundan and others .. *Respondents.*

Evidence Act (I of 1872), sections 35 and 90—Old document—Presumption as to genuineness—Limits of rule—Procedure in admitting old document—Judgment not inter partes*—Admission as to age of predecessor-in-title—Whether can be relied on.*

Section 90 of the Evidence Act states that the Court may draw the presumption referred to in the section and not that it must draw the presumption, and in many cases it would be most dangerous to draw the presumption that a document was genuine merely because it was thirty years old according to the recitals in the document and came from proper custody. It is open to the Court in such a case to mark the document as an exhibit without requiring formal proof and then consider having regard to the evidence and the surrounding circumstances whether it was or was not genuine.

Vaidyanathaswamy Iyer v. *Natesa Malavarayan*, (1921) 41 M.L.J. 310, referred to.

A previous judgment though not *inter partes* is admissible under section 35 of the Evidence Act to prove a statement made by a predecessor-in-title of the party against whom the document is sought to be used. Thus an admission contained in such judgment as to the date of the death of the father of the predecessor-in-title is admissible to prove the date of death of such person.

Krishnaswami Aiyangar v. *Rajagopala Aiyangar*, (1894) I.L.R. 18 Mad. 73, relied on.

Collector of Gorakhpur v. *Ram Sundar Mal*, (1934) 67 M.L.J. 274 : L.R. 61 I.A. 286 : I.L.R. 56 All. 468 (P.C.), explained.

Appeal against the decree of the District Court of Coimbatore in A.S. No. 319 of 1944 preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O.S. No. 130 of 1943.

K. Subba Rao and *P. S. Kailasam* for Appellant.

T. M. Krishnaswami Ayyar and *B. V. Viswanatha Aiyar* for 1st Respondent.

The Judgment of the Court was delivered by

Happell, J.—This is an appeal from the judgment in appeal of the District Judge of Coimbatore, dated the 31st March, 1945, confirming the judgment and decree, dated the 11th April, 1944, of the Subordinate Judge of Coimbatore in O.S. No. 130 of 1943. The suit out of which the appeal arises, O.S. No. 130 of 1943, was brought for redemption of the suit properties on the footing of a mortgage, Ex. P-3, dated 4th June, 1850, executed by one Samanna Goundan in favour of one Krishna Ayyar and one Venkataramana Ayyar and three other persons. Kandaswami Goundan, an undivided son of Samanna Goundan, sold the equity of redemption in the suit properties to the plaintiff on the 29th September, 1938, for Rs. 100. The suit has some remarkable features. Nothing is heard of the suit mortgage between the alleged date of the execution of Ex. P-3, 4th June, 1850, and the sale to the plaintiff on 29th September, 1938. The suit properties, however, had been frequently dealt with by way of mortgage and sale by Krishna Ayyar and Venkataramana Ayyar and their successors for considerable amounts until in 1918 they were sold to the father of the first defendant for Rs. 1,10,000. By the date of suit, it is reasonable to assume that they were worth several lakhs. The plaintiff relied on two other documents, Exs. P-1 and P-2. Ex. P-1 purports to be a patta issued on 6th July, 1847, by the karnam of the village, one Sinnathambi Pillai, in favour of the two persons, Krishna Ayyar and Venkataramana Ayyar. The properties covered by the patta are the suit properties and are expressed to be 3,400 kulis in extent (something over 40 acres), and the assessment payable in respect of the land is stated to be Rs. 315. Ex. P-2 is a sale deed executed on the 14th November, 1849, in respect of the properties covered by Ex. P-1 by Krishna Ayyar and Venkataramana Ayyar in favour of Muthu Goundan for a consideration of Rs. 75. Reference has already been made to Ex. P-3. It purports to be a mortgage of the suit property covered

* S. A. No. 1756 of 1945. 4th December, 1947.

by Exs. P-1 and P-2 by Samanna Goundan, the son of Muthu Goundan, in favour of Krishna Ayyar and Venkataramana Ayyar and three other persons, Athappa, Velappa and Karuma Goundan. It is in evidence, it may be stated here, that the successors of these three Goundans disclaimed all knowledge of the mortgage, Ex. P-3. The first defendant was the only contesting defendant. He claimed the property absolutely under the sale deed of 1918, and maintained that the three documents, Ex. P-1, Ex. P-2 and Ex. P-3 were not genuine. Both the lower Courts agreed with the contentions of the first defendant and have held that Exs. P-1, P-2 and P-3 are not genuine. This is a second appeal against concurrent findings of fact by the lower Courts and the findings, therefore, unless satisfactory reason is shown, cannot now be challenged by the plaintiff-appellant.

It has, however, been argued by Mr. Subba Rao for the appellant that the findings of the lower appellate Court are vitiated by mistakes of fact, by an error in law by reason of a failure properly to apply the provisions of section 90 of the Evidence Act and by the improper inclusion and exclusion of evidence. In order to appreciate the contentions for the appellant, it will be convenient to summarise the reasons as stated in his judgment which weighed with the learned District Judge in holding that the three crucial documents were not genuine. He pointed to the improbable character of the appellant's case as a whole, especially the inadequate consideration for the sale deed, Ex. P-2, and the mortgage, Ex. P-3, in respect of property which was assessed to pay annually Rs. 315 as land revenue, and to the fact that nothing was ever heard of the three documents between the alleged dates of their execution and the sale to the plaintiff of the equity of redemption some 90 years later. On matters of detail tending to show that the documents were not genuine, he was of opinion (1) that the document, Ex. D-2, showed that Sinnathambi Pillai who purports to have issued Ex. P-1 and to have written Exs. P-2 and P-3 and was said to be the karnam of the village was not the karnam at all and was indeed not proved to have existed ; (2) that the pleadings and judgment in O.S. No. 74 of 1844 show that Muthu Goundan, who according to Exs. P-2 and P-3, should have died sometime between 14th November, 1849, and 4th June, 1850, in fact died in 1867, or 1868, while Samanna who purports to have executed Ex. P-3 in 1850, was 42 in 1884, so that he was only 8 years old when the document was executed ; (3) that the document Ex. 4 showed that Venkataramana Ayyar was only 22 in the year 1862, so that when he with others was said to have taken a mortgage in his favour he was only 10 years of age ; (4) that in the course of the inam inquiry of 1862-63 no claim to the property was put forward by Muthu Goundan or his successors ; while on the other hand, there was an assertion, which was accepted, of exclusive title by Venkataramana Ayyar and Krishna Ayyar and the inam was registered in their names ; (5) that although Ex. P-2 recites that the property should be transferred in Muthu Goundan's name, there was never at any time any transfer of patta in favour of Muthu Goundan or his successors ; and (6) that the initials, I.C.W. stamped on each of the three cadjan documents, Exs. P-1, P-2 and P-3 are not, as was suggested for the appellant, the initials of the Collector of the period who was a Mr. J.C. Wroughton.

We will take first the objection that the presumption required by section 90 of the Evidence Act as to documents 30 years old has not been drawn. The learned District Judge has dealt with this question in paragraph 13 of his judgment. His view that in the circumstances of the case the Court was not bound to raise a presumption under section 90 of the Indian Evidence Act and that the proper course was to mark them as exhibits without requiring formal proof and then consider, having regard to the evidence and surrounding circumstances whether they were or were not genuine is in accordance with the decision of this Court in *Vaidyanathaswami Ayyar* v. *Natesa Malavarayan and others*[1]. Section 90 of the Evidence Act states that the Court may draw the presumption referred to in the section and not that it must draw the presumption, and indeed in many cases, the present being

1. (1921) 41 M.L.J. 310.

one, it would be most dangerous to draw the presumption that a document was genuine merely because it was thirty years old according to the recitals in the document and came from proper custody.

As regards the wrongful exclusion of evidence, it is contended that the District Judge should have admitted a document put in by the witness, P.W. 3. We are of opinion that the document was rightly rejected although perhaps the reasons given for rejecting it by the learned District Judge are not altogether correct. On all three documents Exs. P-1 to P-3, the initials, I.C.W. are stamped on the cover of the documents which are written on cadjan leaves, and the document for which admission was sought is a cadjan leaf document relating to a conveyance of property similar in appearance to Exs. P-1 to P-3 and bearing stamped on it the initials I.C.W. The learned District Judge rejected the document because it did not refer to the same property as the suit property. This might not be a sufficient reason for rejecting the document if there had been any object to be served by its admission. The document, however, was produced for the purpose of showing that Exs. P-1 to P-3 must be genuine because a genuine document of the same period, and of the same appearance and character, also bore the initials, I.C.W. We shall have something to say of these initials in a moment. Here it is only necessary to say that the first defendant did not admit the document to be genuine and that the document is not *ex facie* any more genuine than Exs. P-1 to P-3. Its admission, therefore, could have done nothing to prove the genuineness of the other documents, Exs. P-1, P-2 and P-3, and the only result of its admission would have been that the Court would have had to embark on an inquiry into the genuineness of four documents instead of three. Moreover, the document rejected, unlike Exs. P-1, P-2 and P-3, did not even come from proper custody, so that section 90 of the Evidence Act could not be invoked in respect of it.

The findings of the learned District Judge with regard to the date of the death of Muthu Goundan and the ages of Samanna and Venkataramana Ayyar, if they are correct, go far to show by themselves that Exs. P-1 to P-3 are fabrications. If Muthu Goundan was alive when Ex. P-3 was executed, then it is surprising that his son, Samanna Goundan, should have executed it, and still more surprising if at the date of its execution Samanna Goundan was a minor. And again if Venkataramana Ayyar was only twenty-two in 1862, he was only ten when the last of the three documents which he purports to have executed was executed. It is argued, however, by Mr. Subbarao that the documents on which the learned District Judge relied to prove the date of Muthu Goundan's death and the ages of Samanna Goundan and Venkataramana Ayyar were not admissible for the purpose to which they were put. For the date of the death of Muthu Goundan, the learned District Judge relied on the judgment, Ex. D-22 in O.S. No. 74 of 1884, wherein it was stated that it was admitted that Muthu Goundan had died about seventeen years before the date of suit. The judgment was not *inter partes* and it is argued for the appellant that the judgment is not admissible as the purpose for which it was admitted does not fall within any one of the sections 40 to 44 of the Evidence Act. We are inclined to hold, if it were necessary, that the statement regarding the date of the death of Muthu Goundan is admissible. The plaintiff in O. S. No. 74 of 1884 was Samanna Goundan, the father of the appellant's vendor, and in *Krishnaswami Ayyangar* v. *Rajagopala Ayyangar*[1], it was held that a previous judgment was admissible under section 35 of the Evidence Act to prove a statement made by a predecessor-in-title of the party against whom the document is sought to be used. This case was referred to without disapproval by the Judicial Committee in the case of *Collector of Gorakhpur* v. *Ram Sundar Mal*[2] and, in our opinion, the statement contained in the judgment in O.S. No. 74 of 1884 sought to be proved in the present case is not distinguishable from the statement held to be admissible in the case of *Krishnaswami Ayyangar* v. *Rajagopala Ayyangar*[1]. We must, however

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1. (1894) I.L.R. 18 Mad. 73 at 78.
2. (1934) 67 M.L.J. 274 : L.R. 61 I.A. 286 : I.L.R. 56 All. 468 at 490 (P.C.).

add that the actual point which had to be decided in *Collector of Gorakhpur* v. *Ram Sundar Mal*[1] was a much narrower one and did not necessitate a decision as to the correctness or otherwise of *Krishnaswami Ayyangar* v. *Rajagopala Ayyangar*[2]. Whether, however, Ex. D-22 was wrongly or rightly admitted is not of much importance. The facts that Samanna Goundan was a minor when he purported to have executed Ex. P-3 and that Venkataramana Ayyar was a minor when he purported to have executed Exs. P-2 and P-3 appear, in the case of Samanna Goundan, from the plaint in O. S. No. 74 of 1884 wherein he is shown as 42 years of age in 1884, and, in the case of Venkataramana Ayyar from Ex. D-4, a copy of his statement in connection with the Inam Commission Enquiry wherein he is shown as 22 years of age in 1862. Both these documents were clearly relevant for the purpose to which they were put.

We take next the alleged mistakes of fact made by the learned District Judge. They relate to his handling of the evidence regarding the Sinnathambi Pillai who is alleged to have issued Ex. P-1 and written Exs. P-2 and P-3 and of the initials, I. C. W. that appear on the documents, Exs. P-1, P-2 and P-3. As regards Sinnathambi, the learned District Judge has made a mistake to this extent that Ex. D-2 does not exclude the possibility that Sinnathambi Pillai was the karnam of the village on the dates when the documents were executed. This document shows that there were two karnams in the village and the second karnam for the period 1848 to 1852 is not shown. Sinnathambi Pillai, therefore, might have been that karnam ; on the other hand, it is in no way proved that he was. The mistake made by the learned District Judge does not seem to us to be of any great importance.

With regard to the initials I. C. W., as far as we can see, the learned District Judge appears to have made no mistake, although possibly he may not have appreciated exactly what it was that the appellant wanted to prove by pointing to these initials. The fact is that they are not the initials of Mr. J. C. Wroughton who was the Collector of the district at the time when the three documents were executed and they accordingly proved nothing. Moreover, if it was intended to prove that the Collector of the district at the time was in the habit of issuing cadjan documents impressed with his initials in order to show their genuineness, it should not have been difficult to prove this by the production of documents from the Collector's office.

We are, therefore, of opinion that the findings of the lower Appellate Court are not vitiated by reason of mistakes of fact or errors in the admission of evidence. In any case, the criticisms of Mr. Subba Rao leave the evidence and circumstances untouched which most compellingly tend to show that the documents, Exs. P-1 to P-3, are not genuine, as, for instance, the fact that Venkataramana Ayyar and Krishna Ayyar in the course of the enquiry by the Inam Commission asserted and had recognised their exclusive right to the property, whereas Muthu Goundan and his family made no claim in respect of it ; and the fact that Krishna Ayyar and Venkataramana Ayyar frequently dealt with the property as theirs over a long period of years whereas Muthu Goundan and his successors are not shown to have had any dealings with the property between 1850 and the sale of it to the appellant in 1938. We see, therefore, no reason to differ from the concurrent findings of the lower Courts that the documents are not true.

The appeal is dismissed with costs, advocate's fee Rs. 250.

B.V.V. *Appeal dismissed.*

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1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286 : I.L.R. 56 All. 468 (P.C.).
2. (1894) I.L.R. 18 Mad. 73 at 78.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Swaranath Bhatia .. *Appellant**.

Madras Cotton Cloth and Apparel (Exports) Control Order, 1946—Servant contravening provision of and exporting cloth in excess of quantity allowed by the permit—Liability of absent partner for abetment—Onus—Defence of India Rules, rules 5, 121, 122 and 123-A—Scope.

Where a partnership holding a permit exports cloth in excess of the yardage allowed by the permit under the Madras Cotton Cloth and Apparel (Exports) Control Order, 1946, though the partnership cannot be said to be "other body corporate" or "company" under rule 122 of the Defence of India Rules, the partnership (and the individual partners) will be liable under rule 121 for abetment as a "person" for failing without lawful excuse to secure compliance with the order. Every partner who fails without lawful excuse to secure compliance with the order shall be deemed to have contravened the provisions of the order. Rules 5, 121 and 123-A of the Defence of India Rules apply to the case. The burden, according to rule 123-A of the Defence of India Rules of proving that circumstances exculpating him exist, is on such partner. The existence or otherwise of *mens rea* in the partner accused for the acts of his servant is irrelevant.

Leave to appeal to the Federal Court under section 205 of the Government of India Act, 1935, refused.

Appeal against the order of the Court of the Chief Presidency Magistrate, Egmore, Madras, in Case No. 548 of the Calendar for 1947.

V. Sivaprasad for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT.—Against his conviction for having abetted the contravention of rules 4 and 7 of the Madras Cotton Cloth and Apparel (Exports) Control Order, 1946, and thereby committed an offence punishable under rule 81 (*iv*) read with rule 121 of the Defence of India Rules and the sentence of fine of Rs. 300 imposed on him by the learned Chief Presidency Magistrate, Madras, Swaranath Bhatia, a partner in the firm of Viswanath Prem Prakash appeals to this Court and what I have to decide is how far the appellant can be charged with the liability for the crime.

The facts are practically admitted. The appellant is one of the partners of the aforesaid firm and the second accused before the lower Court was said to be the other partner. As there was no tangible evidence to prove that he (second accused) had any connection with the Madras branch, the learned Chief Presidency Magistrate discharged him under section 253 (1), Criminal Procedure Code. The partnership of Viswanath Prem Prakash had been given by the Textile Commissioner, Madras, permit No. 68916, Ex. P-1, granting leave to export 10,000 yards of cloth from Madras to Amritsar in East Punjab. On the 27th June, 1946, presumably acting on this permit, six bales of cotton textiles containing 18,372 yards of cloth were booked for depatch at the Salt Cotaurs goods shed by P. W. 5, an agent and carting contractor, engaged by one Ram Datta, an employee of the firm ; which bales of cloth had been handed over to P. W. 5 by the said Ram Datta for despatch. Accordingly, P. W. 5 signed the consignment forms and risk note and the six bales were delivered over to the railway at the Salt Cotaurs goods shed. On information received P. W. 1, the Textile Control Officer, Madras, seized these bales on 4th July, 1946, while they were being loaded and after further investigation, a charge sheet was filed against the appellant for the offence mentioned above.

The appellant's defence was that these goods were booked by mistake by Ram Datta, his Punjabi clerk and that the appellant himself was not in Madras at that time and knew nothing about the consignment. He further pleaded that

* Crl. Appeal No. 622 of 1947. 28th January, 1948.

he was not a partner in the firm, but no defence evidence was let in to prove these pleas. After ample discussion, the learned Magistrate had no hesitation in holding that the appellant was a partner in the firm, though he agreed with the contention raised by the defence that the appellant had been temporarily absent from Madras during the period when the offence was committed.

Mr. Sivaprasad for the appellant raised three points on the above findings for he did not dispute the conclusion arrived at by the lower Court that the appellant was a partner. The learned counsel argued the appeal accepting the findings of the lower Court and submitted that on the questions of law, the appellant was entitled to an acquittal. The first of such points was that the presumption under rule 122 of the Defence of India Rules regarding the offence committed by corporations cannot apply to the circumstances of the present case; for the partnership in question will not come within the meaning of the expression "other body corporate" in rule 122. The expression "body corporate" should be read as *ejusdem generis* with the word "company" and should be applied to such legal entities as a corporation created by a Royal Charter or a co-operative society or other bodies which do not come within the definition of the term "company."

A partnership as defined in the Indian Partnership Act is not a corporate body because it has no existence separate from its members. A body corporate is a juristic person legally authorised to act as a single individual and partakes of the nature of an artificial person created by a Royal Charter or an act of the Legislature and having authority to preserve certain rights in perpetual succession. The learned Advocate invited my attention to the difference between a partnership and a company enumerated in Salmond on Jurisprudence, 10th edn., at page 329. In Bouvier's Law Dictionary edited by F. Rowle Vol. I, at page 443, a corporation is defined as:

> "a body consisting of one or more natural persons, established by law, usually for some specific purpose and continued by a succession of members."

It is an artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person. In Warton's Law Lexicon, 13th Edn., at page 226, a corporation is stated to connote an artificial person established for preserving in perpetual succession certain rights, which being conferred on natural persons only would fail in process of time. The several members of the corporation and their successors constitute but one person in law. Apart from the partners, the partnership has no legal existence (sections 24 and 25 of the Partnership Act). In view of these definitions and especially because of the word 'other' in rule 122 denoting thereby that the body corporate must be something analogous to a company mentioned immediately preceding and particularly owing to the nature of the rights and liabilities of a partner in a partnership known under the Indian Partnership Act, I am inclined to hold that the words 'other body corporate' cannot apply to a partnership registered or unregistered. The view of the lower Court that a partnership is a "company" is patently unsound.

I may add that the prosecution has not rested its case in the lower Court on rule 122; but the main reliance had been on rule 121 which is in the following terms:

> "Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, any of the provisions of these rules (or of any order made thereunder) shall be deemed to have contravened that provision (or as the case may be that order)."

The learned Public Prosecutor contends that it is this rule that is applicable and when read along with rules 5 and 123-A, there can be no doubt that an individual partner is guilty of any offence committed by persons acting for and on behalf of the partnership. It is undisputed that the Defence of India Rules should be interpreted in accordance with the principles laid down in the General Clauses Act. Section 3 (39) of the General Clauses Act is in the following terms:

" Person shall include any company or association or body of individuals whether incorporated or not."

Substituting this definition for the word person in rule 121, it is abundantly clear that a partnership comes within rule 121. Rule 5 of the Defence of India Rules is as follows :

" If any person to whom any provision of these rules relates or to whom any order made in pursuance of these rules is addressed or relates, or who is in occupation, possession or control of any land, building, vehicle, vessel or other thing to which such provision relates or in respect of which such order is made—

(*a*) fails without lawful authority or excuse, himself or in respect of any land, building, vehicle vessel or other thing of which he is in occupation, possession or control to comply, or to secure compliance with such provision or order, or

(*b*) evades, or attempts to evade, by any means such provision or order—he shall be deemed to have contravened such provision or order and in these rules the expression " contravention " with its grammatical variations includes any such failure, evasion or attempt to evade."

Analysing this complex sentence into its component parts, the portion of the rule applicable to the present case will read thus :

" If any person (partnership) to whom any order made in purusuance of these rules relates fails without lawful excuse to secure compliance with such order, he shall be deemed to have contravened such order."

Reading this with rule 123-A which lays down that where a person is prosecuted for contravening any order made under those rules, the burden of proving that he had excuse for the same shall be on him. It is clear that the onus of proving the excuse is on the appellant in this case. In my judgment rules 5, 121 and 123-A, are the provisions of the Defence of India Rules applicable to the present case. Accordingly to the General Clauses Act, a person includes a partnership and in rlue 5, if a partnership fails to secure compliance with the orders made under the Defence of India Rules such partnership should be deemed to have contravened the provisions of the rules. Now, partnership as such has no existence apart from the individuals constituting the firm. This is an undisputed fact. Therefore every partner who fails without lawful excuse to secure compliance with such order shall be deemed to have contravened the provisions of the order. There can be no doubt that the Madras Cotton Cloth and Apparel (Exports) Control Order was one promulgated under the Defence of India Rules and if there had been a contravention of the terms of a licence granted under that order, by the export of more than 10,000 yards, every partner of the firm which has exported these goods shall be deemed to have contravened the provisions of the order. The burden according to rule 123-A of proving that circumstances exculpating him exist is on such partner.

On this aspect of the case Mr. Sivaparsad argues on the authority of the recent decision of their Lordships of the Privy Council in *Srinivasa Mall Bairolliya* v. *King-Emperor*[1], that their Lordships have held that there is no ground for saying that offences against the Defence of India Rules are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. I fail to see how this decision can be applied to the present case. It is not disputed that the export of more than the permitted quantity of cloth was not justified or that it was not done by the firm without knowing that such export was an offence. The firm purported to act in pursuance of the authority conferred by the permit which on its face shows that only 10,000 yards can be exported. Any export in excess of that quantity was done knowingly and with a due perception that the act is one prohibited by the rules. If that is so, the contravention committed ' by the person ' was with the knowledge that it was a crime. Applying rule 5, when any member of the partnership fails to secure compliance with the provisions of the order, he should be deemed to have contravened the order and according to rule 123-A the burden of proving that he had excuse was on him. In the particular case before the Judicial Committee, Their Lordships found as a fact

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1. (1947) 2 M.L.J. 328 (P.C.).

that the first appellant knew about the offence committed there. What the High Court had held was that, even if the first appellant there, had not been proved to have known of the unlawful acts of the second appellant, he would be liable on the ground that no question of *mens rea* arose where the master is criminally liable for the acts of the servant. After discussing the evidence in the case, their Lordships found that the first appellant there knew about the unlawful act of the second appellant. No question of partnership arose before the Judicial Committee.

Mr. Sivaprasad further contended that it was the duty of the prosecution to prove that the accused contravened the provisions of the order without lawful excuse and that in spite of rule 123-A the burden was on the prosecution to prove knowledge on the part of the appellant. I am not prepared to accept this argument, Rule 123-A categorically and specifically states that the burden of proving that the person had excuse shall be on him and when once it is conceded that the person includes the partnership which means every member of it, I have no doubt whatever that the onus is on the appellant to show that he had excuse. There is nothing to show in the case that the appellant attempted to secure compliance with the provisions of the order.

Mr. Sivaprasad relied upon certain observations of the Privy Council in *Bank of New South Wales* v. *Piper*[1]. Having read that judgment carefully I fail to see how the observations of their Lordships are applicable to the present case.

The next argument of Mr. Sivaprasad is that there is no proof that the appellant had any guilty mind. If I am right in my conclusion on the interpretation of rules 5, 121, and 123-A it seems to me that this argument is also untenable.

A further argument advanced by Mr. Sivaprasad is that the schedule to the Madras Cotton Cloth Dealers Control Order which shows the form in which the permit is to be granted and the conditions to be observed by the licensee does not form part of the order and therefore any contravention of the conditions contained in the permit will not tantamount to a contravention of the order. There is no reason to suppose that the schedule does not form part of the order. The schedules to an enactment like the various schedules to the Criminal Procedure Code are all parts of the Code and I am not prepared, without any compelling authority, to hold that the schedule is not a part of the order.

The last question is as regards the sentence. I do not think it necessary to impose a fine of Rs. 300 on the appellant for an act committed by his servant at a time when he was not in Madras. He is found guilty of the offence because of the special provisions of rules 5, 121 and 123-A of the Defence of India Rules. I would therefore reduce the fine to a sum of Rs. 100. With regard to the order of confiscation of the bales of cloth, I hold that there is no special reason why the three bales which, according to the learned Magistrate, contained the approximate excess yardage attempted to be exported, should be confiscated. I set aside the order of confiscation and direct that the three bales in the condition *in which they are now* will be returned to the firm of Viswanath Prem Prakash. With these modifications the appeal is dismissed. Mr. N. Srinivasan on behalf of the appellant's advocate asks for leave to appeal to the Federal Court. This judgment does not deal with the interpretation of any section of the Constitution Act or of any Order in Council. Section 205 has therefore no application. Leave is refused.

K.S. *Sentence reduced.*

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1. (1897) A.C. 383 at pp. 389 and 390

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kapa Kasi Viswanadham .. *Petitioner**

v.

Bondili Madan Singh and others .. *Respondents.*

Criminal Procedure Code (V of 1898), *sections* 494, 435 *and* 439—*Preliminary register case—Withdrawal—Permission—Power of Court to grant—Recording of reasons for granting such permission—If obligatory—Exercise of discretion—Discharge of accused—Interference in revision—Principles governing.*

It is wrong to say that section 494, Criminal Procedure Code does not authorise the Court to grant permission to withdraw a preliminary register case for the reason that in such a case a Sub-Magistrate cannot pronounce "judgment." The words "in other cases" occurring in clause (1) merely describes a class of cases and do not imply that the trial has reached any particular stage. The words "in other cases before judgment is pronounced" provide for the extreme limit or the ultimate point of time up to which a case can be withdrawn and not that the Court which is empowered to pronounce final judgment alone, is competent to grant permission. Those words are wide enough to include a preliminary register case as well.

Giribala Dasi v. *Madar Gazi*, (1932) I.L.R. 60 Cal. 233, followed.

Section 494, Criminal Procedure Codes does not expressly require the Court to give any reasons for consenting to the withdrawal nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order. It is not the function of the Court to add to the statute by laying down that reasons should be given when section 494 makes no mention of such a thing. Hence, it is not obligatory upon the Court to record any reasons for granting permission to withdraw.

In re *Sadayan*, (1908) 5 M.L.T. 216 ; *Gulli Bhagat* v. *Narain Singh*, (1923) I.L.R. 2 Pat. 708, followed ; *Rajani Kanta Shaha* v. *Idris Thakur*, (1921) I.L.R. 48 Cal. 1105, *Umesh Chandra Roy* v. *Satish Chandra Roy*, (1917) 22 C.W.N. 69 ; *Jagat Chandra Roy* v. *Kalimuddi Sardar*, (1921) 26 C.W.N. 880, not followed.

When a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court as a revisional Court will not interfere with an order of discharge.

Ordinarily the High Court will not entertain a revision against a discharge by a Magistrate where the aggrieved party has not moved the Sessions Court or the District Magistrate before coming up to the High Court.

Petition under sections 435 and 439 Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate, Bezwada taluk, dated 5th September, 1947, in P.R.C. No. 2 of 1946.

A. Ramachandran of *Row and Reddy* for Petitioner.

V. Rajagopalalachari, *M. V. Ganapathi* and *M. Ranganadha Sastri* for Respondents.

The Public Prosecutor and Assistant Public Prosecutor for Crown.

The Court made the following

ORDER.—P.R.C. No. 2 of 1946 on the file of the Sub-Magistrate, Bezwada taluk, was a prosecution against the present respondents for offences under various sections of the Indian Penal Code relating to rioting, theft, criminal trespass and dacoity. After the enquiry had proceeded for some time, the Assistant Public Prosecutor Bezwada filed a memorandum dated 5th September, 1947, before the Sub-Magistrate under section 494 of the Criminal Procedure Code requesting that he may be permitted to withdraw the prosecution against the accused. On the receipt of this application, the learned Sub-Magistrate passed the following order :

"The Assistant Public Prosecutor, Grade II, Bezwada is permitted under section 494, Criminal Procedure Code to withdraw the prosecution in the case as per the orders of the Government and the District Magistrate, Kistna and the accused are discharged."

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* Crl. R. C. No. 1235 of 1947. (Crl. R. P. No. 1121 of 1947). 28th January, 1948.

As is to be inferred from this order, the District Magistrate, Kistna had forwarded to the Sub-Magistrate a copy of a telegram received by him from the Provincial Government directing him to withdraw P.R.C. No. 2 of 1946 and C.C. No. 512 of 1946 on the file of the same Sub-Magistrate. Both the cases have accordingly been withdrawn and the respective accused discharged.

The present petition is by one Kapa Kasi Visvanadham stated to be the complainant and P.W. 1. in P.R.C. No. 2 of 1946 requesting this Court to interfere under the powers of revision and set aside the order of discharge on the ground that the learned Sub-Magistrate has not, in giving the consent of the Court for the Public Prosecutor to withdraw the case, exercised his judicial mind regarding the desirability or otherwise of granting such permission and has not given any reasons why the permission was granted. In support of this application a long affidavit by the petitioner has been produced and there is also a counter-affidavit answering the various allegations contained in the petitioner's affidavit. In the light of the conclusion I have come to on the question of law I do not propose to discuss the allegations and the counter-allegations or give an opinion on the merits. My learned brother Yahya Ali, J., admitted the revision adding a note that no reason for withdrawal is given in the telegram or in the Magistrate's order.

The first argument of the learned Counsel for the petitioner is that section 494, Criminal Procedure Code does not authorise the Court to grant permission to withdraw a preliminary register case for the reason that in such a case a Sub-Magistrate cannot pronounce "judgment." It is strenuously contended that it is only in cases where the Court is empowered to pronounce a judgment that leave to withdraw can be granted. According to the learned advocate the section can apply only to Courts where there are jury trials in which case part one of clause (*i*) of the section will apply and to other Courts which are empowered to pronounce judgment in the case. The basis of the argument is that an order of discharge is not a judgment and the case can proceed to judgment only when the full trial is over. Reliance is placed on the observation of Pinhey, J., in *Emperor* v. *Maheswara Kondayya*[1], where that learned Judge was of the view that an order of discharge was not a judgment. A judgment is an order in a trial terminating in either the conviction or the acquittal of the accused. The other learned Judge, Munro, J., did not express any opinion as regards the meaning of the term judgment. Granting that an order of discharge does not amount to a judgment, does it necessarily follow that clause (*i*) of section 494 does not apply to a Court which is not empowered to pronounce judgment in any particular case from granting permission for withdrawal. In *Giribala Dasi* v. *Madar Gazi*[2], Mukerjee J., agreeing with Remfrey, J., was of the view that there is no such restriction. Clause (*i*) wherein the words "in other cases" occur merely describes a class of cases and do not imply that the trial has reached any particular stage. The words "in other cases before judgment is pronounced" provide for the extreme limit of the ultimate point of time upto which a case can be withdrawn and not that the Court which is empowered to pronounce final judgment alone, is competent to grant permission. Nothing has been suggested why I should not agree with the views expressed by the learned Judges of the Calcutta High Court especially in view of the circumstances that the longstanding practice for more than half a century in all the Courts in our province has been the same. Even in a preliminary register case it is open to the Magistrate under section 209 of the Criminal Procedure Code after recording evidence to decide whether it is a case triable by himself or whether the same should be committed to a Court of Session. Therefore section 209 of the Criminal Procedure Code gives ample power to a Magistrate enquiring into cases triable by a Court of Session or the High Court to convert what was initiated as a preliminary register case into a calendar case. The words in section 209:

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1. (1908) I.L.R. 31 Mad. 543 at 544. 2. (1932) I.L.R. 60 Cal. 233.

"unless it appears to the Magistrate that such person should be tried before himself or other Magistrate in which case he shall proceed accordingly."

afford ample authority for holding that a case which was a preliminary register case in its initial stage can become one in which the Magistrate can pronounce judgment so that it seems to me that the expression in section 494 of the Criminal Procedure Code " in other cases before judgment is pronounced " is wide enough to include a preliminary register case as well.

On the second point there is a sharp cleavage of opinion among the various High Courts. So far as our Court is concerned, in dealing with the powers of withdrawal under section 494, Criminal Procedure Code it has been held as long ago as 1908 in *In re Sadayan*[1], that neither the Public Prosecutor nor the Judge is called on to give any reasons for his action, that is, either in the application to withdraw or in granting premission to withdraw. The learned Judges there disagreed with the view expressed in Crl.R.C. No. 274 of 1907. Perusing the records in that case, I find that it was a case where during the course of the hearing before a Sessions Court, from the evidence of a certain witness it was found that the accused did not commit the crime but that the witness himself was responsible. On that, the Public Prosecutor withdrew the case on the suggestion of the Court. The learned Judges who considered the correctness of this withdrawal in revision were of opinion that reasons should have been given. In the peculiar circumstances of that case it may very well be that it was desirable to give some reasons. But the bench which decided *In re Sadayan*[1], took a different view. Neither the appellant's learned advocate on the one side nor the Public Prosecutor and Mr. Rajagopalachari on the other, have been able to show any decision of this Court either dissenting from the view expressed by Wallis and Abdur Rahim, JJ., or concurring with it. In view of the circumstance that this decision has stood for nearly forty years without being questioned, I am bound to follow the same.

The matter does not rest there alone. In *Gulli Bhagat* v. *Narain Singh*[2], Mullick and Mcpherson, JJ., after discussing the question at some length have dissented from the view taken by the Calcutta High Court in *Rajani Kanta Shaha* v. *Idris Thakur*[3], *Umesh Chandra Roy* v. *Satish-Chandra Roy*[4], and *Jagat Chandra Roy* v. *Kalimuddi Sirdar*[5]. The learned Judges have held, interpreting the section as it stands, that there is no provision of law compelling a Magistrate to record his reasons for granting permission to withdraw and that would be to overstate the law to say that reason should be given. Section 494 does not expressly require the Court to give any reasons for consenting to the withdrawal nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order. It is further laid down that when a discretion has been exercised by a Court of competent jurisdiction which is not, on the face of it arbitrary, the High Court as a revisional Court will neither enquire into the reasons for such withdrawal nor interfere with it especially at the instance of a private party. The learned Judges of the Patna High Court did not make any reference to the decision in *In re Sadayan*[1], but their reasoning and conclusion are the same even though expressed in stronger terms than that of our Court. In *Lakshminarain Varma* v. *Mohamed Hanif*[6], the same view has been expressed by Harrison, J., agreeing with the opinion of the Patna High Court in *Gulli Bhagat* v. *Narain Singh*[2], and disagreeing with the view taken by a single Judge of the Rangoon High Court in *Abdul Gani* v. *Abdul Kader*[7]. Here also no reference to the Madras case is made. In *Ratanshah Kavasji* v. *Keki Behramsha*[8], N. J. Wadia and Sen, JJ., dissenting from the Calcutta High Court's view and agreeing with the views of our Court and of the Patna High Court,

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1. (1908) 5 M.L.T. 216.
2. (1923) I.L.R. 2 Pat. 708.
3. (1921) I.L.R. 48 Cal. 1105.
4. (1917) 22 C.W.N. 69.
5. (1921) 26 C.W.N. 880.
6. A.I.R. 1932 Lah. 368.
7. (1923) I.L.R. 1 Rang. 756.
8. I.L.R. (1945) Bom. 141.

expressed the opinion that in permitting the Public Prosecutor to withdraw from the prosecution under section 494, Criminal Procedure Code the Court is not bound to record its reasons for giving consent. That the same is the view taken by the Nagpur High Court will be revealed by the decision in *Dattatraya Govindrao* v. *Emperor*[1], where Grille, J., expressed the opinion that it is desirable no doubt to give reasons for giving permission to withdraw a case but to say that it is essential to give reasons is overstating the law. The Code of Criminal Procedure makes no such requirement. I need hardly add that I am bound to follow the judgments of this Court in preference to that of other Courts.

I have already stated that the Calcutta High Court has consistently taken a different view, *vide* the decisions in *Rajani Kanta Shaha* v. *Idris Thakur*[2], *Umesh Chandra Roy* v. *Satish Chandra Roy*[3], and *Jagat Chandra Roy* v. *Kalimuddi Sirdar*[4]. The Rangoon Court also agrees with Calcutta.

I do not think it permissible to import into the language of the section words which are not there. There are many sections in the Code where the giving of reasons is made obligatory as for example sections 263 (*h*), 203 and 209 and various other sections. It is not the function of the Court to add to the statute by laying down that reasons should be given when section 494 makes no mention of such a thing. For the above reasons I hold that it was not obligatory upon the Magistrate to record any reasons for the withdrawal and since it is not shown that he has acted arbitrarily or in any unjudicial manner, the order of discharge cannot be interfered with.

There is another circumstance which has to be considered in deciding whether this Court should exercise the revisional powers. There is nothing to show that P.W. 1, the complainant objected to the Public Prosecutor withdrawing the case. On the other hand, it is stated for the respondents that both the case and the counter case were withdrawn, that the present petitioner was an accused in the counter case and he had the benefit of a withdrawal of the case against him. That was the reason why he did not object to the withdrawal of the case in which he was the complainant. The learned counsel for the petitioner has not denied this fact nor has he proved to my satisfaction that the complainant did not acquiesce in the withdrawal of P.R.C. No. 2 of 1946. There was another remedy open to the complainant by moving the Sessions Court to set aside the order of discharge if really he had a just cause for complaint. Ordinarily, this Court will not entertain a revision against a discharge by a Magistrate where the aggrieved party has not moved the Sessions Court, or the District Magistrate before coming up to this Court. The petitioner here has not availed himself of that remedy as well and this is a circumstance against this Court entertaining his application for revision. This revision petition is accordingly dismissed.

V.S. *Petition dismissed.*

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1. A.I.R. 1938 Nag. 76.
2. (1921) I.L.R. 48 Cal. 1105.
3. (1917) 22 C.W.N. 69.
4. (1921) 26 C.W.N. 880.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

Subbiah Pillai *alias* S. S. M. Subramania Pillai .. *Appellant**

v.

Sankarapandiam Pillai and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 14 *and section* 99—*Plaint not signed by all the plaintiffs —Effect—Decree—If to be interfered with on appeal.*

Where a plaintiff has not signed a plaint filed with his knowledge and consent it is an omission which can be cured and should be corrected in the interests of justice. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. The curing of the defect comes within the provisions of section 99 of the Code of Civil Procedure.

Mohinimohan Das v. *Bungsi Budhah Saha Das*, (1889) I.L.R. 17 Cal. 580 and *Basdeo* v. *John Smidt*, (1899) I.L.R. 22 All. 55, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, dated 2nd August, 1945, and made in O.S. No. 68 of 1944.

K. R. Rama Aiyar for Appellant.

K. Venkateswaran for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The three plaintiffs and the first defendant are first cousins, being grandsons of one Sankarapandiam Pillai ; the plaintiffs are the sons of Subbasamia Pillai and the first defendant is the son of Narayanasamia Pillai, who were sons of the parties' grandfather. Sankarapandiam Pillai married a second time in 1915: Previously, there was an arrangement in the family regarding the division of the property belonging to it and Sankarapandiam Pillai took a one-third share. He died in 1923. A son by the second wife, Subbiah Pillai, died in 1925. The widow's death took place in 1943. The three plaintiffs claimed three shares, each one-fourth, in Sankarapandiam Pillai's property, agreeing that the first defendant was entitled to the remaining one-fourth share. The plaintiffs' claims were the subject-matter of the suit. It is unnecessary to refer to the second and third defendants.

After the pleadings were closed, issues were framed, the first issue being as follows:

> " Whether the suit is not maintainable for the reason that all the plaintiffs have not signed the plaint but the third plaintiff has signed under a power ? "

The third plaintiff held a power of attorney from his two brothers, the other two plaintiffs, and he alone signed the plaint. The defendant's contention, arising out of that circumstance, is the following : the power of attorney does not authorise the third plaintiff to institute suits on behalf of the other two plaintiffs ; consequently the suit, instituted in the Court of the Subordinate Judge of Tuticorin, can be treated only as a suit by the third plaintiff and the sole relief to which he is entitled is a one-fourth share in his grandfather's estate ; the value of that share is such that the suit would fall within the jurisdiction of the Court of the District Munsiff of Tuticorin and not within the jurisdiction of the Subordinate Judge's Court ; consequently that Court had no jurisdiction to entertain the suit.

The above issue was tried as a preliminary issue on the 18th July, 1945, when it was held that the power of attorney, although not happily worded, did include authority for the third plaintiff to institute suits for and on behalf of the other two plaintiffs and, consequently, the objection raised by the first defendant fell to the ground.

It is convenient to go back in the order of date and to refer to an application, I.A. No. 367 of 1944, filed by the plaintiffs at the same time as the presentation

* Appeal No. 610 of 1945. 18th December, 1947.

of the plaint in the suit on the 22nd November, 1944. In that application, it was alleged that the third plaintiff held a power of attorney from the first and second plaintiffs authorising him to conduct all proceedings on their behalf in the capacity of their agent. That application was granted. Later, on the 28th March, 1945, the plaintiffs instituted a further application praying that permission may be given to enable the first and second plaintiffs to ratify the proceedings taken by the third plaintiff on their behalf. In the affidavit supporting that application it is stated that the suit, in which the plaint is signed by the third plaintiff, is one instituted on behalf of all the plaintiffs and, in paragraph 8, an offer was made by the first and second plaintiffs to sign the plaint. That application came for disposal on the same day as the trial of the preliminary issue on 18th July, 1945, and, in the light of the finding on the issue, the application was dismissed as being unnecessary. The first defendant presented a civil revision petition against the order recording the finding upon the effect of the power of attorney and the correctness of the third plaintiff instituting the suit on behalf of himself and the other plaintiffs. That was presented on the 31st July, 1945, and subsequently it has been withdrawn and dismissed; but no point arises out of the dismissal.

The suit was posted for trial before the learned Additional Subordinate Judge on the 2nd August, 1945; it was known sometime previous to the 2nd August that the suit would be heard on that date. Upon it being called on for trial, an application was presented by an advocate appearing on behalf of the first defendant asking for an adjournment until an order for stay of the suit could be obtained from the High Court in respect of the civil revision petition. The learned Additional Subordinate Judge, having heard the application, refused to accept it and it was dismissed. Thereupon the advocate appearing for the first defendant reported that he had no instructions and withdrew, and the suit was tried in his and his client's absence and a decree was passed in plaintiff's favour.

In the present appeal two points arise: (1) challenging the correctness of the learned Additional Subordinate Judge's dismissal of the application for adjournment and (2) against the finding on the preliminary issue relating to the effect of the power of attorney, that it authorised the third plaintiff to institute and conduct proceedings for and on behalf of the first and second plaintiffs.

In regard to the first point it was conceded that the first defendant was aware, some time before that the suit was posted for trial to the 2nd August, 1945, that that was the date upon which the hearing would take place, and that ordinarily the first defendant should have instructed his counsel to appear and to defend the suit; he also should have been present himself. It would seem that he preferred to rely upon the result of the presentation of the civil revision petition to obtain the indulgence of the Court by the grant of an adjuornment. There was no reason whatever for his absence, save a deliberate intention to abstain from the Court when previously he had been apprised that the hearing would take place.

Refusal or grant of an application for adjournment is a matter of discretion, which discretion, of course, must judicially and properly be exercised. There is nothing here which warrants interference with the dismissal of the application by the learned Subordinate Judge. It was urged that the first defendant should be afforded an opportunity of presenting his case to the Court and a decision being obtained in light of the evidence and other matters sought to be put forward on behalf of the first defendant. That was well appreciated at the time when no step was taken in that behalf and what could have been done on 2nd August, 1945. No reason has been forthcoming to explain his failure to do so. In my view there is nothing justifying interference with the learned Additional Subordinate Judge's dismissal of the application for an adjournment. It follows that there is no occasion to remand the suit back to the trial Judge for re-hearing.

In regard to the second point. At the outset it has to be observed that it is devoid of any merits. At the highest there was a failure to follow the strict provisions of the Code of Civil Procedure. Order 6, rule 14 provides that every pleading shall be signed by the party and his pleader if any, provided that, where

a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. That provision corresponds to the provisions of section 578 cf the Code of 1882.

In *Mohinimohan Das* v. *Bungsi Budhah Saha Das*[1], one of the three plaintiffs had not signed the plaint. In reference to that omission their Lordships of the Judicial Committee observed at page 582 of the report as follows :

> " In the first place it was said that the plaints were signed and verified by Mohini Mohan alone. But that is immaterial. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint."

Later at page 583 it is observed, further, that,

> " Their Lordships think that Khatter Mohun, as well as Gobind Rani became a party, as plaintiff, on the 2nd of November, 1883, and that the suits therefore are not barred by lapse of time."

Basdeo v. *John Smidt*[2] is a decision to a like effect where it was held that a defect in the signature of the plaint or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be cured by amendment at any stage of the suit and is not a ground for interference, in appeal. Those two decisions were given at the time when the Code of 1882 was in force. In *Basdeo's case*[2] reference is made to section 578 of the old Code which corresponds to section 99 of the Code of 1908. That section enacts that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. The result of the above decisions by the Judicial Committee and the High Court of Allahabad is that where a plaintiff has not signed a plaint, filed with his knowledge and consent, it is an omission which can be cured, and, indeed, should be corrected in the interests of justice. Regarding Order 6, rule 14 of the Code, the commentary in the late Sir Dinshah Fardunji Mulla's work on the Code of Civil Procedure refers to the two cases cited above and then adds this :

> " If the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court."

With respect I subscribe fully to the observations in Sir Dinshah Fardunji Mulla's book.

Considerable argument was addressed to us relating to the effect and extent of the authority given to the third plaintiff by the power of attorney issued to him by his two brothers. In the light of the conclusion at which I have arrived and the direction which will be given, it is unnecessary to consider whether the interpretation and construction placed upon the power by the learned Additional Subordinate Judge were correct. The objection raised in respect of the absence of the signatures of the first and second plaintiffs is one of high technicality and devoid of all merits, and the curing of any defect, which there may be, comes within the provisions of section 99 of the Code.

It may well be that the direction which I propose to give in a moment may not be required, in the light of the order which was made on the 22nd November, 1944, by which the third plaintiff was permitted to conduct all proceedings on behalf of the other two plaintiffs. It is unnecessary to consider whether that order should or should not have been made. It was made and it still stands not having been set aside or challenged. Nevertheless, it seems by way *ex abundanti cautela*, that the first and second plaintiffs should sign the plaint. There is abundant authority for this Court to give that direction and there will be an order for them

1. (1889) I.L.R. 17 Cal. 580.
2. (1899) I.L.R. 22 All. 55.

to sign the plaint within one month and the amendment of the pleading will be carried out in the Court of the Subordinate Judge of Tuticorin. If this direction is not followed then the matter will be reported to this Court forthwith.

The result of the appeal is that it will be dismissed with costs.

Yahya Ali, J.—I agree.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

Swarnavalli Achi and another .. *Petitioners**

v.

P.L.N.K.M. Nagappa Chettiar .. *Respondent.*

Letters Patent (Madras), clauses 15 and 39—Final judgment in appeal by the Judges of the High Court against judgment of the original side Judge of the High Court—Whether governed by clause 39 of the Letters Patent.

An appeal preferred to a Bench of Judges against a decision of a single Judge sitting on the original side of the High Court under the provisions of clause 15, Letters Patent, confers, not original, but appellate jurisdiction upon the Court to entertain an appeal; and when such an appeal has been entertained and heard, it is pursuant to the appellate jurisdiction conferred by clause 15. Though the appeal relates to a matter decided in the exercise of the ordinary original civil jurisdiction, the appeal itself is not in the exercise of that jurisdiction, but as mentioned, in the exercise of appellate jurisdiction. That being the position, such a judgment in respect of which an application for leave to appeal to the Judicial Committee of His Majesty's Council is made is not a final judgment, decree or order in the exercise of the Court's original jurisdiction, and hence it does not come within clause 39 of the Letters Patent.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to appeal to His Majesty in Council against the decree dated 27th November, 1947 and made in O.S.A. No. 23 of 1947 on the file of the High Court, Madras, (Appellate Jurisdiction).

A. V. Viswanatha Sastri and *A. M. Krishnaswami Iyengar* for Petitioners.

V. S. Rangachari for Respondent.

The Order of the Court was made by

The Chief Justice.—This is an application for leave to appeal to His Majesty in Council against a decision on appeal of this Court which reversed a decision of Kunhi Raman, J., given in the exercise of Ordinary Original Civil Jurisdiction of this Court which, in turn, reversed a decision of the learned Master.

The relevant facts are the following : A decree was passed by the Court of the Subordinate Judge of Devakottah in O.S. No. 112 of 1934 for approximately a sum of Rs. 9,000 together with interest and costs. That decree was transferred to this Court for execution. The learned Master, before whom the execution petition came, held that the petition was barred by the provisions of the law of limitation and dismissed the application. Kunhi Raman, J., reversed the learned Master's order and directed execution to issue. At the date of the disposal of the matter before the learned Judge a sum approximately of Rs. 13,000 was due in respect of the decree, the addition of about Rs. 4,000 representing further interest and costs in the suit and proceedings. The matter came before this Court on appeal and the conclusion was expressed that the execution petition was barred and it was dismissed.

Applications for leave to appeal to His Majesty in Council are subject to sections 109 and 110 of the Civil Procedure Code and also pursuant to clause 39 of the Letters Patent. At the outset, Mr. Viswanatha Sastri, for the applicant, conceded that he could not pursue the present application under sections 109 and

*Civil Miscellaneous Petition No. 7374 of 1947. 9th January 1948.

[redacted] however, [redacted] 39 of the [redacted]

> [redacted] r persons may ap[redacted] . . . . . . in any [redacted] gment, decree or or[redacted] of the said High [redacted], and from any final judgment, decree or [redacted] of the said High Court, or of any Division [redacted] gh Court under the provisions contained in [redacted]

[redacted] at clause 39 confers a right of appe[redacted] circumstances : (1) in respect of any [redacted] igh Court made on appeal, and (2) fr[redacted] made in the exercise of original jurisdictio[redacted]

[redacted] onceded that the right of appeal, referred to in (1), is subject to the [redacted] ntained in sections 109 and 110 of the Code and that there is no addi- [redacted] appeal, conferred in that respect by the clause, to that found in the [redacted] ed sections. It was, however, contended that the second right of [redacted] rred by the clause has application in the present instance. It was argued that the decision in appeal by this Bench from the decision given in the exercise of the original jurisdiction of this Court is a final judgment, decree or order in the exercise of original jurisdiction. I am unable to accept that contention. The appeal from the decision of Kunhi Raman, J., was preferred to this Court pursuant to the provisions of clause 15 of the Letters Patent which confers, not original, but, appellate jurisdiction upon this Court to entertain an appeal against the decision of a single Judge and when the appeal in the present instance was entertained and heard, it was pursuant to the appellate jurisdiction conferred by clause 15. Whilst the appeal relates to a matter decided in the exercise of ordinary original civil jurisdiction, the appeal itself was not in the exercise of that jurisdiction, but as mentioned, in the exercise of appellate jurisdiction. That being the position, the judgment in respect of which the present application for leave to appeal is made is not a final judgment, decree or order made in the exercise of the Court's original jurisdiction. Since it was not such an order, it does not come within clause 39 of the Charter and there is no right of appeal specially conferred in respect of it.

In my opinion, for the reasons given, this application must fail and be dismissed with costs.

Bell, J.—I agree.

K.C. *Application dismissed.*

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...s proved to have been in the last stages of consumpti... ...eme weakness, has declared in his will that he had no rel... ...d mind he must have known that the statement was ... ...favour of strangers is invalid.

...gment and decree of the Supreme Court of Fij... 3rd April, 1944.

...*.C.* and *Jopling* for Appellants.

... *Umrigar* for Respondents.

...gment was delivered by

...This is an appeal from a judgment and decree of the S... Court of Fiji in its probate jurisdiction which decreed probate of a wil... 3rd April, 1944, of an Indian named Jaimal who died on the day after th... tion of the will. The issue to be decided is whether that will, which was i... of the respondents, Amirchand and Mehar, as the sole beneficiaries, is ... whether a will dated 25th February, 1944, in favour of the testator's nephe... to be admitted to probate.

The testator was a Sikh who had come to Fiji about 38 years before h... He had made a considerable fortune as a money-lender and his estate... to more than £20,000. He was illiterate and ill-educated, but he co... his name in English. Amirchand and Mehar were in no way relate... but they were both indebted to him at his death, Amirchand for a... and Mehar for £6,500. The testator had no wife or child, but he ... brother who lived in India and who died about 1940 or 1941. Th... had four sons, the beneficiaries under a will of 26th November, 1941, ... confirmed by a codicil of 1st July, 1942 and they and their father ha... beneficiaries under a still earlier will of 21st January, 1938. It is ... the testator had been on affectionate terms with his brother to whom ... prolonged visit in India in 1938 to 1940, and that he was also on good ... his nephews, to two of whom he had at one time given a power of attorn... them to deal on his behalf with certain property belonging to him in ... employed a firm of solicitors in Fiji, Messrs. Ellis, Munro, Warren ...

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* 8th December, 1947.

attend to his affairs and this firm had been inst[illegible]d by him to draw up the testamentary writings above referred to except t[illegible]nd disputed writing of 3rd April, 1944. Jaimal became gravely ill with[illegible]y tuberculosis, and in the early part of 1944 he was in the Suva Gover[illegible]tal. He left that hospital in February and went to the Sikh temple at S[illegible] was while he was at this temple that he executed the will of 25th Febru[illegible], appointing the president, secretary and treasurer of the Sikh Gurdwara Committee at Samabula, Suva, to be his executors and trustees and leaving all his property to his four nephews equally. Amirchand was present at the making of this will. Shortly afterwards, as Jaimal wanted to enter the Lautoka hospital at Ba, Amirchand brought him to a stable near Mehar's house at Ba in which he stayed for a few days before entering the hospital. He removed from there to the Sikh Gurdwara at Lautoka, and was next taken to a house hired by Mehar at Yalaleva, where he arrived about two or three weeks before his death. On Friday, 31st March, he received a visit from a young man named Hari Charan, who, as a boy about twelve years earlier, had had some acquaintanceship with him. Hari Charan gave evidence that this was the third visit that he had paid to Jaimal in as many weeks and that it was a casual visit. Jaimal, however, on this occasion is said to have lost no time in taking Hari Charan into his confidence about his testamentary intentions. According to Hari Charan, whose evidence the learned Chief Justice appears to have accepted only because it was uncontradicted, Jaimal told him that he wished to make a will in favour of Mehar and Amirchand because they had looked after him so well and he asked Hari Charan to get a lawyer to draw up a will for him. Hari Charan asked whether he had ever made a will before and Jaimal said he had made two, but that he was not worrying about them and that he wished to make his last will in favour of these men. He also said that he had neither wife nor children, but that he had relatives "regarded as brothers" in India to whom he had given sufficient property in the way of money and assets. It does not appear from Hari Charan's examination-in-chief that Jaimal asked him to do more than to get a lawyer for him, but in his cross-examination he says that Jaimal asked him to get a will drawn up in favour of Amirchand and Mehar. Hari Charan went on the same day to Mr. Davidson, a lawyer in Fiji, and gave him instructions which enabled Mr. Davidson to draw up the will. Amirchand accompanied Hari Charan to Mr. Davidson's office, but remained outside, and Mr. Davidson is said to have had no direct communication with him that day. The will is in the following terms:

> "This is the last will and testament of me Jaimal (father's name Nehala) formerly of Suva but now of Yala Levu in the district of Ba in the colony of Fiji 'Financier'. I revoke all former wills and testamentary dispositions made by me and declare this to be my last and only will. After payment of all my just debts funeral testamentary and medical expenses I give devise and bequeath unto my dear friends Amirchand (father's name Utham) and Mehar (father's name Saudi) both of Yala Levu aforesaid farmers as tenants in common in equal shares absolutely all my estate and property whatsoever and wheresoever situate and whether in possession reversion or remainder and I appoint them the said Amirchand and Mehar to be the trustees and executors of this my said will. I declare that I have no next of kin nor blood relations in Fiji or elsewhere who are known to me. I desire to express by this my said will my deep gratitude to the said Amirchand and Mehar for their devotion to me during my present illness."

Mr. Davidson deponed that the expressions of affection for and gratitude to Amirchand and Mehar were inserted by him of his own volition and without instructions from Hari Charan, and that for the statement that Jaimal had no next of kin nor blood relations in Fiji or elsewhere his only warrant was Hari Charan's statement that Jaimal had no wife or children and that he inferred the rest. Mr. Davidson typed out this draft will either on the afternoon of Friday, 31st March, or the next morning. According to their evidence, Amirchand and Hari Charan had expected Mr. Davidson to deal with the will as a matter of urgency, and as no progress had been made by the Monday morning they went in a taxi cab to his office and took him to see Jaimal. Mr. Davidson said that he put questions to Jaimal and read over the will in Hindi and then in English which was again translated into Hindi by his clerk, that Jaimal listened carefully and at the end gave his assent to the will and said he wanted nothing in it changed, and that, among

other questions put to Jaimal before he gave his final assent, Mr. Davidson asked who Amirchand and Meha[illegible]d Jaimal put a hand on each of these two men and spoke with affection [illegible]d said he wanted to give them all his property. In answer to other questi[illegible]they were the only persons who had helped him in his illness, that he had [illegible] in Fiji, and that he did not know if he had any relations elsewhere than [illegible] Mr. Davidson also said he was told by Jaimal that he had made a previous will, but Mr. Davidson asked no questions about its contents. Jaimal tried to sign the will, but his hand was too shaky. He then tried to affix his thumb mark, but he was too weak to do so unaided and Mr. Davidson had to help him. Mr. Davidson considered that Jaimal was a very sick man though his mind was perfectly logical. He also formed the opinion that Jaimal was not receiving adequate medical treatment and he said so to Amirchand. Amirchand and Mehar were present in the room with Mr. Davidson and Jaimal during the whole interview between them, and it is significant that Amirchand, who must have heard the questions and answers about Jaimal's relations and who must also have known from being present when the earlier will was made that Jaimal had nephews in India, did not intervene to correct Jaimal's memory. Amirchand in his own evidence, which was disbelieved by the learned Chief Justice, falsely depones that he did intervene to say that Jaimal had nephews in India. It was, no doubt, in consequence of Mr. Davidson's advice that Amirchand took Jaimal to a hospital in the afternoon. Jaimal was by that time unable to speak. The doctor found that he was in a very weak condition, but gave him some medicine and told Amirchand to take him home. Jaimal died next day.

The objections to the validity of the will of 3rd April, 1944, urged in the Court below were : (1) that it was not duly executed according to the provisions of the Wills Act, 1837; (2) that Jaimal was not, when he executed it, of sound mind, memory or understanding ; (3) that the execution was obtained by the undue influence of Amirchand and Mehar; and (4) that Jaimal did not know or approve the contents. The learned Chief Justice summarily rejected the first, third and fourth of these objections. In the appeal to their Lordships' Board nothing was said in support of the first objection, which was merely a technical objection to the authentication of the will. Nor was it maintained that Jaimal did not know the contents of the will in the sense that he did not understand the meaning and effect of the words read to him. It was no longer denied that he gave his assent. The charge of undue influence was not abandoned at the hearing of this appeal, but it was not pressed because, as counsel for the appellants explained, the evidence on which he relied for proof of undue influence was in part the evidence relied on for proof that Jaimal was not of sound mind, memory or understanding, and if it was not sufficient to establish that ground of objection it would not suffice to prove the undue influence. The issue of undue influence is in this case purely one of fact, and, as the learned Chief Justice has found in favour of the respondents, their Lordships would not be disposed to reverse his finding though the evidence gives reason for the gravest suspicion.

The issue whether Jaimal was of sound mind, memory and understanding was decided by the learned Chief Justice on what seems to their Lordships a misunderstanding of *Parker* v. *Felgate*[1]. That case decided that, if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings and if the solicitor prepares the will in accordance with these instructions, the will will stand good though at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them. The learned Chief Justice applied this case by holding that Jaimal gave instructions to Hari Charan at a time when his memory was not proved to be defective ; that these instructions were properly embodied in the draft will by Mr. Davidson ; that Jaimal was able to understand the will and to give his assent to it on the day of execution ; and, therefore, that Jaimal was of sound disposing mind at that date. The principle illustrated in *Parker* v. *Felgate*[1]

1. (1883) 8 P.D. 171.

and in the similar case of *Perera* v. *Perera*[1] has, in their Lordships' opinion, no application to the present case. Apart from the single answer already noticed in cross-examination the tenor of Hari Charan's evidence is that Jaimal merely asked him to obtain a lawyer to draw his will. The words spoken to by Hari Charan in the examination-in-chief are : " Will you procure a lawyer for me to draw up the will," and in another place he was asked : " And he asked you to get a lawyer for him and you promised to do so," and answered " That is right." Their Lordships would be reluctant on this evidence to take it as proved that Jaimal asked Hari Charan to give specific instructions to a solicitor on his behalf. Nor is it apparent from Hari Charan's account of the conversation that Jaimal intended to leave the whole of his property, wherever situated, to Amirchand and Mehar to the exclusion of his relations, and Hari Charan does not speak of any express direction that the previous will should be destroyed or cancelled. The learned Chief Justice has made no specific finding, but has tacitly assumed that Hari Charan received specific instructions which he was to transmit to a solicitor to draw a will cancelling all previous wills and leaving all that Jaimal possessed to Amirchand and Mehar equally between them. Their Lordships are further of opinion that the principle enunciated in *Parker* v. *Felgate*[2] should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the Court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.

The learned Chief Justice was, accordingly, not entitled to conclude, as he did, that it was unnecessary to determine what was the condition of Jaimal's memory on the day when the will was executed. That was, indeed, the only day on which Jaimal was seen by Mr. Davidson, and it is plain from Mr. Davidson's evidence that, though he had drafted a will on information supplied to him by Hari Charan with, as he supposed, the authority of Jaimal, he was not satisfied until he had obtained instructions from Jaimal himself. There were, moreover, in the draft will, as has been seen, statements which Mr. Davidson had inserted of his own volition and he said he was at pains to put these statements to Jaimal. One of these was the statement that Jaimal had no next of kin nor blood relations in Fiji or elsewhere. It was on this statement that the appellants chiefly founded the argument that the testator was not of sound mind, memory and understanding when he executed the will. The respondents' counsel maintained that the finding that Jaimal knew and understood the contents of the will was a conclusive answer to this argument, but that is a misunderstanding of the judgment of the learned Chief Justice who expressly says that he found it unnecessary to enquire into the state of Jaimal's memory on the day when the will was executed. A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet, if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid. In *Banks* v. *Goodfellow*[3], Cockburn, C.J., delivering the judgment of the Court said :

"It is essential to the exercise of such a power (*scilicet*, testamentary power) that a testator shall understand the nature of the act and its effects ; shall understand the extent of the property of which he is disposing ; shall be able to comprehend and appreciate the claims to which he ought to give effect ; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, and prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

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1. (1901) A.C. 354.
2. (1883) 8 P.D. 171.
3. (1870) 5 Q.B. 549 at 565.

In *Harwood* v. *Baker*[1] the same principle had been stated and it was observed that, when a testator suffering from a debilitating disease had made a will excluding from his bounty his near relations in favour of his wife, it was necessary to determine whether he was at the time capable of recollecting who those relations were, of understanding their respective claims on his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. In *Sivewright* v. *Sivewright's Trustees*[2], Lord Haldane, with whom Lord Dunedin and Lord Buckmaster concurred, said :

> "The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act . . . . if his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to be the outcome of the special delusion."

There is, of course, in the present case no question of insanity in the general or in the popular sense, but here the testator, who is proved to have been in the last stages of consumption and to have been reduced by disease to extreme weakness, has declared in his will that he had no relations anywhere, though if he had been of sound mind in the sense of the cases cited he must have known that the statement was untrue.

The testator immediately before giving assent to the terms of the will had said that he did not know whether he had relations elsewhere than in Fiji. This, however, does not better the case but merely provides additional evidence of his weakness and vacillation of memory about his relations. There is evidence that at an earlier stage of his illness the testator had at one time remembered these nephews in whose favour he had made a will as recently as in February, 1944, and had been under the mistaken belief that he had made by gift adequate provision for them. At other times he appears, according to some of the evidence, to have remembered that they took benefits under the wills he had made. The evidence as a whole shows that, though the Chief Justice may or may not have been warranted in saying that there was no good ground for inferring that Jaimal's memory was defective on March 31, there was a rapid degradation of his memory of his nephews till at last he reached the stage, when he executed his will, of denying their existence. It is relevant to note that he failed to employ the solicitor who had acted for him on previous occasions or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of sound mind who deliberately intended to alter his will and to disinherit his near relations would naturally take. The result was that he obtained the services of a solicitor unacquainted with his family affairs and unable to judge whether he had the capacity to make a will with due regard for the claims of his nephews for whom he had till the closing days of his life always felt a warm affection. The opinion of Mr. Davidson and some other witnesses that Jaimal's mind was clear and logical and sound, though it might have had some value if the question had been one of his general sanity, is of no value in the present case where the question is whether there was a particular defect of memory caused by the weakness of disease. Witnesses were adduced to prove that the testator had a week or so before his death expressed to them his intention of leaving his property to Amirchand and Mehar. The evidence is of little relevance to the issue on which the appeal must turn. The learned Chief Justice does not mention this evidence, and their Lordships do not doubt that he had the fullest justification for ignoring it, and since it was pressed on their attention their Lordships think it proper to say that after considering it they deem it unworthy of credit and that its only effect is to deepen the suspicion which surrounds the will.

Their Lordships are satisfied that the proper conclusion, disregarding all questions of *onus*, is that the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of execution and that the

1. (1840) 3 Moo. P.C.C. 282. 2. (1919) S.L.T. 261 at 262.

disposition of his property under it was the outcome of the delusion touching his nephews' existence. The will is, therefore, invalid. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that judgment should be entered against the will of April 3, and that probate of the will of February 25th, 1944, should be decreed in solemn form, and that the order for costs in the Court below should be set aside, except so far as it applies to the executors of the will dated 25th February, 1944. The respondents will pay the appellants' costs in the appeal.

Solicitors for Appellants: *Hy. S. L. Polak.*

Solicitors for Respondents: *T. L. Wilson & Co.*

K.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.[1])

PRESENT:—LORD DU PARCQ, LORD NORMAND, LORD OAKSEY AND LORD MORTON OF HENRYTON.

Musammat Jaggo Bai .. *Appellant**

v.

Rai Bahadur Hari Har Prasad Singh and another .. *Respondents.*

Interest—Abandonment by plaintiff of claim for specific performance—Decree on alternative claim for refund of money paid—Date from which interest can be awarded on the amount due.

In a suit filed on 23rd February, 1932, the plaintiff claimed specific performance of a contract, dated 16th December, 1928, for the sale to him by the defendants of their rights under a mortgage-deed and in the alternative, for a refund of the money which had been paid to the defendants with interest by way of compensation from the date of payment up to the date of realization. When the case came on for trial, the plaintiff on 20th February, 1937, withdrew his claim for specific performance. It was found that it was the defendants who had refused to carry out the sale agreement and that the plaintiff was entitled to the refund of the money paid to the defendants. On the question as to the date from which interest by way of compensation was payable on the amount decreed,

Held, in view of the fact that in the circumstances of the case, the form of relief by way of specific performance could not be obtained by the plaintiff, he could not be awarded any interest for the period prior to 20th February, 1937, when he abandoned his claim for specific performance of the sale agreement. But from that date however, he was rightfully claiming the return of the money paid to the defendants which they were wrongfully withholding from him. Hence interest by way of compensation was payable only as from that date but from no earlier date.

Appeal from a judgment and decree of the High Court (September 22, 1939) which modified a decree of the Civil Judge of Banda (March 19, 1937).

Pullan and *Jayakar* for Appellant.

Rewcastle, K.C. and *S. Hyam* for 1st Respondent.

Their Lordships' Judgment was delivered by

LORD MORTON OF HENRYTON.—This is an appeal, by one of the two defendants in an action, from a decree of the High Court of Judicature at Allahabad, whereby the present appellant was ordered to pay to the plaintiff in the action, the respondent Rai Bahadur Hari Har Prasad Singh (hereafter called "the respondent") the sum of Rs. 26,000, with interest thereon at the rate of 4 per cent. per annum from 16th December, 1928, down to the date of payment. The other person named as a respondent, Seth Beni Chand, is not before their Lordships' Board and no question arises as to him.

The relevant facts are as follows: On 18th February, 1921, one Babu Bindeswari Prasad executed a mortgage of a village called Nayagaon in favour of the appellant

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1. I.L.R. (1940) All. 52.

* P. C. Appeal No. 41 of 1943. 26th June, 1947.

and her son, Seth Beni Chand, to secure a total sum of Rs. 60,000, with interest. On December 16th, 1928, the appellant signed a document whereby, after referring to the mortgage of February 18th, 1921, she stated :

"I, the executant, myself paid the entire amount of debt from my own pocket. As I am a pardanashin lady, I got the name of Seth Beni Chand entered in the mortgage deed by way of precaution. At present I stand in need of money and it seems impossible for me to realise the amount of the document aforesaid."

The remainder of the document, as set out in the judgment of the High Court, is as follows :

"Accordingly negotiations for transfer of the document aforesaid together with all the rights were started with Rai Bahadur B. Hari Har Prasad Singh through B. Girja Shankar Vakil of Lucknow, and it has been settled that I shall transfer the amount of the mortgage deed aforesaid with interest together with all the rights and powers for a sum of Rs. 52,000 and I shall see that the Rai Bahadur aforesaid acquires the entire property permanently. In case the legal advisers of the Rai Bahadur aforesaid consider that I would not be in a position to transfer the entire property mentioned in the mortgage deed free from all defects and disputes, unless Seth Beni Chand is made to join the deed of transfer, I shall transfer to the Rai Bahadur aforesaid one-half of the property mentioned in the document aforesaid for a sum of Rs. 26,000 without raising any plea or objection. Whenever within three years the Rai Bahadur aforesaid wants I shall execute the deed of transfer in respect of the mortgage deed, dated 18th February, 1921, and have it registered in any way and in favour of anyone proposed by him. For the present, I have already received a sum of Rs. 7,000 out of the amount agreed upon by means of a cheque No. 4-A 19,887, dated 28th November, 1928, and I have this day received Rs. 19,000 by means of cheque No. 4-A 19,893, dated 16th December, 1928, *i.e.*, in all I have received a sum of Rs. 26,000. At the time of compliance and completion of the deed of transfer I shall, as directed by the Rai Bahadur aforesaid, allow credit for the sum of Rs. 26,000 and accept the balance of the amount settled, whatever it might be, subject to the terms noted above."

By this document, as their Lordships construe it, the appellant agreed that she would either transfer the mortgage to the respondent or, if the respondent's legal advisers took a certain view, she would transfer to the respondent "one-half of the property mentioned in the document aforesaid." It is not necessary to consider how the latter form of transfer would have been framed or what would have been its effect; for reasons which will appear later, these questions did not arise in either of the Courts in India. The document does not contemplate that Seth Beni Chand shall be a party to the proposed transfer, either of the whole or the half, nor does it contemplate that he shall receive any part of the purchase price. It is clear from other documents that the appellant and her son were far from friendly at this time.

On 25th December, 1928, Seth Beni Chand wrote a letter to the respondent which is, so far as material, in the following terms :

"I too shall have no objection to the settlement made between you and my mother Musammat Juggo Bai with regard to the mortgage deed dated 18th February, 1921, executed by B. Bindeshwari Prasad, deceased, *i.e.*, she would transfer the mortgage deed aforesaid to whomsoever you would write for a sum of Rs. 52,000 principal and interest...............I also agree to that transaction, but out of Rs. 52,000 a sum of Rs. 26,000 ought to be given to my mother and a sum of Rs. 26,000 to me. If you have paid a sum of Rs. 26,000 to my mother so much so good and if you have not yet done so please do pay the amount."

The writer goes on to emphasise that the respondent should keep "in deposit" the remaining half of the purchase price, and continues :

"As regards the existing dispute between me and my mother I shall soon get it settled. If, God forbid, it is not settled at an early date I shall get the amount from you after giving a sufficient security and you would not be put to loss. But if you without asking me pay the amount of my half share, *i.e.*, Rs. 26,000, to my mother, I shall not be bound by the said settlement."

It appears, therefore, that although the mother and son were both willing that the mortgage should be transferred to the respondent at the price of Rs. 52,000, they held differing views as to who should receive the purchase money. The mother insisted on receiving the whole, the son insisted on receiving half. In these circumstances it does not appear that the documents just quoted constituted an agreement whereof specific performance could have been obtained against both the mother and the son.

In the events which happened, no transfer to the respondent was ever executed, and on 23rd February, 1929, both the mother and the son wrote letters by which they clearly refused to carry out any transfer. However, negotiations for the completion of the sale appear to have continued, for reasons which it is unnecessary to discuss, and on 7th December, 1931, shortly before the expiry of the three-year period mentioned in the document of 16th December, 1928, a vakil acting for the respondent served a notice on the appellant in the following terms :

> "As directed by my client Rai Bahadur Hari Har Prasad Singh, resident of Arrah, notice is hereby given to you that as per agreement, dated the 16th of December, 1928, you had promised that in case on the advice of and in consultation with the legal advisors the aforesaid Rai Bahadur should be willing you shall execute a deed of transfer, *i.e.*, a sale deed with respect to one-half of the demand including interest due under the mortgage deed, dated the 28th of February, 1921, for a sum of Rs. 60,000 executed by Babu Bindeshwari Prasad in favour of Musammat Jaggo Bai and Beni Chand in consideration for a sum of Rs. 26,000 which amount has already been received by you by means of two cheques and that you shall transfer to the aforesaid Rai Bahadur by means of execution and completion of the sale-deed all the rights and interest appertaining thereto ; and that you have not executed and completed the said document in spite of repeated demands and in spite of having received the amount referred to above. So if you fail to complete the document within a period of four days remedy shall be sought in Court after the expiry of the time allowed and you shall be saddled with costs."

The notice went on to make an alternative offer, which need not be set out. By her reply to that notice, which is dated 11th December, 1931, the appellant refused to comply with it, and rejected the alternative offer, but in a letter of 14th December, 1931, signed by Seth Beni Chand and by counsel on behalf of the appellant, and also in certain telegrams, the defendants expressed their willingness to transfer the mortgage on payment of a further sum of Rs. 26,000. The respondent did not accept this proposal and, in their Lordships' view, he was justified in refusing to accept it. Both Courts in India found as a fact that the respondent had already paid Rs. 3,000 on account of the purchase price to Seth Beni Chand, in addition to the Rs. 26,000 which he had paid to the appellant, and that the balance still remaining due was therefore Rs. 23,000 and not Rs. 26,000.

On 23rd February, 1932, the respondent issued his plaint in the Court of the Subordinate Judge of Banda against the present appellant and Seth Beni Chand. The relief claimed by the plaint was as follows : (a) That the defendants be ordered to execute a deed of assignment of their mortgagee rights under the mortgage deed, dated 18th February, 1921, executed by the late Bindeshwari Prasad in favour of the defendants on payment by the plaintiff of a sum of Rs. 23,000 the balance of the amount of sale consideration or any other amount that the Court may be pleased to fix, and a decree in favour of the plaintiff be passed for the specific performance of the contract against the defendants. (b) That if, for any reason, in the opinion of the Court a decree for specific performance of contract cannot be passed, the defendants may be ordered to refund the sum of Rs. 29,000 with interest to the plaintiff, and a decree for a sum of Rs. 26,000 be passed against the defendant No. 1 and for a sum of Rs. 3,000 against the defendant No. 2, with interest by way of compensation from the date of payment up to the date of realization, and the Court may grant any further relief. (c) That the costs of the suit may be awarded to the plaintiff against the defendants.

It is to be noted that the respondent did not claim a transfer of "one-half of the property mentioned in the mortgage deed" from the appellant. The case came on for trial before the Subordinate Judge, and on 20th February, 1937, after all the evidence had been given,

> "Babu Makut Behari Lal, pleader for the plaintiff, stated that regard being had to the facts of the case, he does not want to press the point re specific performance prayed for in relief."

The Subordinate Judge gave judgment on 19th March, 1937. He held that each of the defendants "rescinded the contract without any reasonable cause" and that the respondent (the plaintiff before him) was prepared to carry out his part of the contract and was entitled to be refunded the amount paid by him to the defendants. He thought that each of the defendants should pay interest at the rate of 6 per cent. per annum on the sums received by them respectively up to the

date of repayment of these sums by them. Accordingly, he gave judgment in favour of the respondent for Rs. 26,000 against the appellant and for Rs. 3,000 against Seth Beni Chand, with interest at the rate aforesaid, and ordered that the respondent's costs should be paid by the defendants in certain proportions.

The present appellant appealed alone to the High Court of Judicature at Allahabad. That Court held that the appellant and Seth Beni Chand had "repudiated the contract;" and that the Subordinate Judge was right in ordering the appellant to repay Rs. 26,000 to the respondent, but modified the order of the Subordinate Judge by giving to the respondent interest on the Rs. 26,000 at the rate of 4 per cent. only, from 16th December, 1928, down to the date of payment. The appellant was ordered to pay the respondent's costs of the appeal, and the order of the Subordinate Judge as to costs was left undisturbed.

Their Lordships do not think it could truly be said that there were concurrent findings of fact in the two Courts in India. The finding that the defendants had repudiated or rescinded the contract was, in substance, an expression of opinion as to the true construction and effect of the relevant letters and telegrams. The appellant appeals from the order of the High Court, and counsel contended on her behalf that the defendants in the action had never repudiated the agreement to transfer the mortgage and that the conduct of the respondent amounted to a repudiation. He relied particularly on two points: (1) That the appellant was never informed of the advice the respondent had obtained from his legal advisers; and (2) that the appellant and Seth Beni Chand had offered to transfer the mortgage to the respondent by the letter of 14th December, 1931, and the telegrams already mentioned. As to the former contention, it was not a term of the sale agreement of 16th December, 1928, that the respondent should inform the appellant of the advice he had obtained and, in any event, their Lordships think that the notice of 7th December, 1931, makes it reasonably clear that the respondent's legal advisers had advised him that the appellant could not execute a valid transfer of the mortgage as a whole without the concurrence of Seth Beni Chand. It is indeed difficult to see how the legal advisers could have arrived at any other conclusion, and the evidence shows that the respondent had taken advice. At the trial before the Subordinate Judge a witness on behalf of the respondent stated:

> "We had taken legal advice from Babu Ganga Prasad regarding the agreement obtained from Mst. Jaggo Bai."

As to the latter contention, their Lordships adopt the reasoning of the High Court, which was expressed as follows:

> "The offer of December 14, 1931, to execute a deed of transfer of the mortgage rights by Musammat Jaggo Bai and Seth Beni Chand on payment of Rs. 26,000 was not a *bona fide* offer to carry out the contract. The sum due by the plaintiff under the contract was Rs. 23,000 and not Rs. 26,000. In these circumstances, in our judgment, the defendants and not the plaintiff are in breach of the contract."

Their Lordships feel no doubt that the defendants refused to carry out the sale agreement, and counsel for the appellant naturally felt unable to contend that, if this were the true view of the matter, the claim for return of the Rs. 26,000 paid to the appellant could be resisted. He did, however, attack that portion of the decree of the High Court which awarded interest from 16th December, 1928, onwards, contending that no interest should be awarded, or, alternatively, that no interest should be awarded prior to 20th February, 1937, when the respondent abandoned his claim for specific performance of the sale agreement. Their Lordships agree with the alternative contention. They are prepared to assume in favour of the respondent, without deciding the point, that interest could be awarded from an earlier period, but they are clearly of the opinion that the discretionary power to award such interest, if it exists, should not be exercised in the circumstances of the present case. During the whole of the period prior to 20th February, 1937, the respondent was claiming specific performance of the sale agreement against both defendants to the action—a form of relief which, in their Lordships' view, he could never have obtained. The respondent had never, during that period, made any demand for repayment of the Rs. 26,000 save the demand in the plaint, which was conditional on the Court

expressing the opinion that a decree for specific performance of the contract could not be passed. At any time prior to 20th February, 1937, the appellant could have resisted any claim for repayment of this sum, on the ground that the respondent was still seeking specific performance and that, if he obtained that relief, the appellant would be entitled to retain this part of the purchase price. As from 20th February, 1937, having regard to the abandonment of the claim for specific performance, the respondent was rightfully claiming the return of the Rs. 26,000 and the appellant was wrongfully withholding that sum from him. In these circumstances, their Lordships think that an award of interest at 4 per cent. as from that date, but from no earlier date, does justice between the parties. The contrast between the position prior to 20th February, 1937, and the position after that date, when the respondent for the first time sought unconditionally the return of the money paid, does not appear to have been brought to the attention of the High Court and, in these circumstances, their Lordships feel justified in differing from the exercise by that Court of its discretion to award interest, even on the assumption that such a discretion existed in regard to interest accruing before 20th February, 1937.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be modified by altering the date for the commencement of interest from 16th December, 1928, to 20th February, 1937. Each party must pay his or her own costs of this appeal. The orders of the Courts in India as to the costs of the proceedings before them will remain undisturbed.

Solicitors for Appellant : *Summerhays & Co.*

Solicitors for 1st Respondent : *Douglas Grant and Dold.*

V.S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(In Insolvency.)

PRESENT :—MR. JUSTICE CLARK.

In the matter of Rm. N. V. Viswanathan Chettiar and others of Uma & Co. .. *Insolvents.**

Presidency Towns Insolvency Act (III of 1909), *section* 36—*Orders under, summoning persons capable of giving evidence of the insolvent's dealing with his property—If governed by Order XVI of the Code of Civil Procedure.*

The issue of summons under section 36 of the Presidency Towns Insolvency Act to persons capable of giving evidence of the insolvent's dealing with his property is governed by Order XVI of the Code of Civil Procedure.

Quaere : Whether rule 19 of Order XVI (the 200 mile rule) operates to limit the jurisdiction of the Court.

Abdul Rahim Sahib & Co., In re, (1928) 54 M.L.J. 715, considered and distinguished.

Unreported decision in O. S. A. No. 30 of 1917 followed.

Dinaram Somani and others, In re, (1923) C.W.N. 370, doubted.

The Official Assignee (*K. N. Ganpati*) in person.

The Court made the following

ORDER.—I am satisfied that the issue of summonses in these matters is governed by Order XVI of the Code of Civil Procedure. Section 36 of the Presidency Towns Insolvency Act empowers the Court to summon before it,

" any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property."

Section 37 provides that in such cases the Court,

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* Applications Nos 493 to 495 of 1947 in I.P. No. 18 of 1947. 10th November, 1947.

"shall have the same powers to issue commissions and letters of request for the examination on commission or otherwise of any person liable to examination under section 36, as it has for the examination of witnesses under the Code of Civil Procedure, 1908."

In Original Side Appeal No. 30 of 1917* (unreported) Sir John Wallis, C.J. and Oldfield, J., held that these two sections (sections 36 and 37) read with the Original Side Rules applied Order XVI of the Code of Civil Procedure to orders under section 36. The learned Master's difficulty arises from a decision made 11 years later by Waller, J., in *Abdul Rahim Sahib & Co.*[1] The case decided by Sir John Wallis, C.J. and Oldfield, J., concerned, an application for the issue of summons under section 36 for the purpose of securing the production of certain books of account, papers and statements. The case disposed of by Waller, J., was one wherein a summons was required to secure the attendance and examination of a person alleged to be a debtor of the insolvent. In the earlier case, after holding that Order XVI of the Code of Civil Procedure applied to such cases, the Bench held that rule 19 had no application to a case where the summons sought was one for production of documents and that accordingly the two-hundred mile rule would not operate. This decision appears to have been referred to before Waller, J., but he held it to have no application in the case before him which concerned the examination of a person who, *vis-a-vis* the Official Assignee was in the position of a litigant and not a "mere witness." Such a distinction cannot be made in respect of applications which I am now considering which were applications for the examination of persons capable of giving evidence of the insolvent's dealing with his property. I am satisfied that the matter is concluded by the decision of the Bench.

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*Judgment delivered in the case of *Murugappa Chetty and Company* v. *The Official Assignee of Madras*, O.S.A. No. 30 of 1917 by Wallis, C.J. and Oldfield, J.—This appeal is from an order of Mr. Justice Coutts-Trotter under section 36 of the Presidency Towns Insolvency Act ordering the appellants to produce all books of account, papers and statements relating to the settlement of accounts of the firm of A.M. Murugappa Chetti and Company in or about May 1915, and in particular the settlement of accounts, statement showing all debts due to the firm and all accounts showing monies which have been recovered subsequent to such settlement. The first objection taken on behalf of the appellants is that Mr. Justice Bakewell as Insolvency Judge having refused a similar application, Mr. Justice Coutts-Trotter had no jurisdiction to pass this order. Under section 8 of the Insolvency Act, the Insolvency Judge has power to review his order and this is in accordance with the decision in Ex parte *May*, 12 Q.B. 497. It is sufficient to say that in the circumstances of the present case, we are not prepared to interfere with the exercise of the learned Judge's discretion in his decision to entertain the motion.

Then it is objected that the order as to the summonses served on the appellants who are residents of Madura, a place more than 200 miles away from Madras is without jurisdiction. Section 90 of the Insolvency Act provides that:

"In proceedings under this Act, the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction; provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act"

and this must be read with section 37 which gives the Court the same powers to issue commissions and letters of request for the examination on commission or otherwise of any person liable to examination under section 36 as it has for the examination of witnesses under the Code of Civil Procedure, 1908. Reading these two sections together and also the Original Side Rules, we think that in respect of orders under section 36 of the Insolvency Act, the Court is governed by the provisions of Order XVI of the Code of Civil Procedure and by any rules relating to the same matter to be found in the Original Side Rules. Order XVI makes a great distinction between summonses to give evidence and summonses to produce documents because under rule 6 a person summoned to produce a document shall be deemed to have complied with the order by causing it to be produced instead of attending personally to produce it and rule 19 provides that no one shall be ordered to attend in person to give evidence unless he resides within the limits specified in the rule. There is no such provision as to a summons merely to produce a document because, no matter how far distant the person summoned has his residence, he can comply by causing the document to be produced and it is not necessary for him to attend in person. It therefore follows that the learned Judge had jurisdiction to order the appellants residing in Madura to produce the documents although Madura is more than 200 miles away.

It is next argued that the order is too wide and the Official Assignee has intimated that he does not oppose the rescinding of the second part of the order at the present time and pending further investigation. We think therefore that the order may be modified by limiting it to the order to produce all books of accounts, papers and statements relating to the settlement of accounts of the firm of A. M. Murugappa Chetti in or about May, 1915, including the day books and ledgers of that year. Otherwise the appeal fails and is dismissed with costs. The C.M.P. is dismissed.

1. (1928) 54 M.L.J. 715.

The Official Assignee has urged that the correct view is that taken by Greaves, J., in In re *Dinaram Somani and others, Insolvents*[1]. He urges that the application of Order XVI, rule 19, to applications under section 36 of the Presidency Towns Insolvency Act must necessarily operate to limit the jurisdiction of the Court. It is, of course, well settled law that that jurisdiction extends throughout the province. He contends section 37 can be regarded only as an enabling section. These arguments do not commend themselves to me but it is unnecessary for me to examine them as I am bound by Bench decision, to which I have already referred.

K.S. *Ordered accordingly.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD UTHWATT, LORD DU PARCQ, LORD OAKSEY AND SIR JOHN BEAUMONT.

Gokulchand Dwarkadas Morarka .. *Appellant**

v.

The King .. *Respondent.*

Cotton Cloth and Yarn (Control) Order (1943), *clause* 23—*Sanction under—Validity—Essentials—Matters to be considered in giving sanction—Scope and effect of sanction—Sanction under Criminal Procedure Code* (*V of* 1898), *sections* 195 *to* 199—*Difference—Absence of valid sanction—Defect, if curable under section* 537 *of the Criminal Procedure Code.*

In order to comply with the provisions of clause 23 of the Cotton Cloth and Yarn (Control) Order, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority.

The sanction to prosecute constitutes a condition precedent to the institution of the prosecution and the government have an absolute discretion to grant or withhold their sanction. They are not concerned merely to see that the evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. The Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case.

A sanction given without reference to the facts constituting the offence is not a compliance with the actual terms of clause 23 The sanction required is for a prosecution of a person for having done acts which constitute a breach of the Order.

The giving of the sanction confers jurisdiction on the Court to try the case and the Court must try the case in the ordinary way under the Code of Criminal Procedure. The charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates.

Sanctions under sections 195 to 199 of the Code of Criminal Procedure (V of 1898) are directed to different objects. Even under the Code sanction would be given in respect of the facts constituting the offence charged.

Where there is no valid sanction there is a defect in the jurisdiction of the Court which can never be cured under section 537 of the Code of Criminal Procedure.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave from the judgment and order of the High Court of Judicature at Bombay dated 5th September, 1946, setting aside the acquittal of the appellant of an offence under clause 18 (2) of the Cotton Cloth and Yarn (Control) Order, 1943, by the judgment and order of the City Magistrate of Sholapur and sentencing the appellant to undergo rigorous imprisonment for one month and to pay a fine of Rs. 1,550.

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1. (1923) 27 C.W.N. 370.

* P. C. Appeal No. 99 of 1946. 13th January, 1948.

The facts giving rise to the prosecution of the appellant were stated in a written report made by Mr. Mulik, Sub-Inspector of Police, Food Control, Sholapur, to the Sub-Inspector of Police, Sholapur, on 24th January, 1945. The report which is Ex. No. I "L" was in the following terms :

"I, Raghunath Santaji Mulik, Sub-Inspector of Police, Food Control, Sholapur, give in writing as follows :—

Having got information that there were cloth without 'Textile' mark and grain hoarded in the bungalow situate at Motibag belonging to the Old Mill at Sholapur, Mr. Yasin Ansar Bhai, the Inspector of Police, took search of the said bungalow on the date the 4th August, 1944 ; but as it drew dark the search of the outhouse pertaining to the said bungalow remained to be taken. Therefore, the rooms of the said outhouse were sealed. On the date the 5th August, 1944, the Inspector of Police ordered me to take search of the said outhouse. In pursuance thereof I took search of the said outhouse. In the same Dhoti pairs 196 (measuring) 1,903¼ yards with a name in the borders ; Dhoti pairs 426 (measuring) 3,804¼ yards with no name in the borders ; Patals (Sarees) 25 (measuring) 125 yards; and muslin pieces 3 (measuring) 60 yards in all 5,892 yards of cloth without "Textile" mark were found. All that has been seized after making a Panchanama.

Mr. Gokulchand Dwarkadas Morarka is the agent of the Sholapur Old Mill. Whenever he comes to Sholapur, he puts up in the bungalow situated at Motibag. Mr. Gokulchand Dwarkadas has purchased from the said mill by oral order the aforesaid cloth between the dates the 2nd December, 1942 and 15th March, 1943, for his own use ; and all that cloth has been taken and kept in the said bungalow on 2nd August, 1943.

As Mr. Gokulchand Dwarkadas Morarka has been staying at Malad, I went to Malad and took search of his house. Whatever clothes of daily wear were found in the same, were sufficient (for use) to him and the members of his family. Accordingly, a Panchanama of the clothes in his house was made.

As Mr. Gokulchand Dwarkadas Morarka has kept with him cloth in excess of what was necessary, I have a complaint against him on behalf of the Government according to clause 18 (2), Cotton Cloth and Yarn (Control) Order (of) 1943."

For the purposes of the present appeal it will be assumed that the facts stated in that report were proved and constituted an offence under section 18 (2), Cotton Cloth and Yarn (Control) Order, 1943.

Section 23 of that Order as amended provides that :

"No prosecution for the contravention of any of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government (or of such officer of the Provincial Government not below the rank of District Magistrate as the Provincial Government may by general or special order in writing authorise in this behalf)."

On 5th January, 1945, sanction to the prosecution of the appellant was given by Order of the Government of Bombay in the following terms :—

SANCTION TO PROSECUTE.

(Signed) H. N. G.

Cotton Cloth and Yarn (Control)
Order, 1943.
Contravention of the Provisions
Prosecutions for—

Government of Bombay.

Finance Department (Supply).

Resolution No. 518.

Bombay Castle, 5th January, 1945.

Endorsement from the District Magistrate, Sholapur, No. XIX/4500, dated 8th November, 1944.

Resolution :—Government is pleased to accord sanction under clause 23 of the Cotton Cloth and Yarn (Control) Order, 1943, to the prosecution of Mr. Gokulchand Dwarkadas Morarka for breach of the provisions of clause 18 (2) of the said Order.

By order of the Governor of Bombay,

(Signed)

Deputy Secretary to Government, Bombay.

To

The District Magistrate, Sholapur.

It will be observed that this sanction, which is Ex. I on the record, specifies the appellant as the person to be prosecuted and the clause of the Order which he is alleged to have contravened, but does not specify the acts of the appellant alleged to constitute such contravention. The question which arises for decision on this appeal is whether this sanction, read with the evidence adduced at the trial, constituted a due compliance with the provisions of clause 23 of the said Order. The Trial Magistrate held that the sanction was sufficient, but acquitted the accused on the merits of the case. On appeal by the Government of Bombay against this acquittal the High Court convicted the appellant as already stated.

Upon the question as to the sufficiency of the sanction the High Court noticed two previous decisions of such Court, Criminal Appeal Nos. 535 of 1945 and 548 of 1946, by which it had been held that the burden of proving that the requisite sanction had been obtained rested on the prosecution and that such burden involved proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based, facts which might appear on the face of the sanction, or might be proved by extraneous evidence. The Court accepted this view of the law, but held that in the case of the appellant it had been proved that the facts on which the prosecution was proposed to be based had been before the sanctioning authority when the sanction was given. The view of the Court upon this question appears from the following passage in the judgment of the Court:

> "A Sub-Inspector who attached the cloth has sworn that on 8th September, 1944, he submitted a report to the District Superintendent of Police asking for sanction to prosecute the accused under clause 18 (2) of the Cotton Cloth and Yarn (Control) Order, 1943. Subsequently the matter was forwarded to the District Magistrate and the Resolution granting sanction itself refers to the endorsement of the District Magistrate, Sholapur No. XIX/4500, dated 8th November, 1944. It is true that in his cross-examination the Sub-Inspector admitted that he had not got a copy of the aforesaid endorsement made by the District Magistrate, but his evidence would show that the said endorsement was made in reference to the report which the Sub-Inspector had forwarded to the District Superintendent of Police as already stated."

This view of the facts is not supported by the evidence on record. There is no evidence to show that the report of the Sub-Inspector to the District Superintendent of Police, which was not put in evidence, was forwarded to the District Magistrate, nor is there any evidence as to the contents of the endorsement of the District Magistrate referred to in the sanction, which endorsement also was not put in evidence. The prosecution was in a position either to produce or to account for the absence of the report made to the District Superintendent of Police and the endorsement of the District Magistrate referred to in the sanction, and to call any necessary oral evidence to supplement the documents and show what were the facts on which the sanction was given. Their Lordships see no justification for drawing inferences in favour of the prosecution upon matters on which they withheld evidence under their control. Under section 114, Evidence Act, illustration (*g*) the normal presumption is that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

Upon this state of the evidence the respondent has argued that the view which has prevailed in the High Court of Bombay is wrong and that a sanction which names the person to be prosecuted and specifies the provision of the Order which he is alleged to have contravened is a sufficient compliance with clause 23 of the said Order. In their Lordships' view, in order to comply with the provisions of clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the

evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23. Under that clause sanction has to be given to a prosecution for the contravention of any of the provisions of the Order. A person could not be charged merely wih the breach of a particular provision of the Order; he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution—that is, for having done acts which constitute a breach of the Order—that the sanction is required. In the present case there is nothing on the face of the sanction, and no extraneous evidence, to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order, and the sanction is invalid.

Mr. Megaw for the respondent has suggested that this view of the law would involve in every case that the Court would be bound to see that the case proved corresponded exactly with the case for which sanction had been given. But this is not so. The giving of sanction confers jurisdiction on the Court to try the case and the Judge or Magistrate having jurisdiction must try the case in the ordinary way under the Code of Criminal Procedure. The charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates.

Their Lordships were referred to certain decisions upon the group of sections in the Code of Criminal Procedure, 195 to 199, relating to sanctions. These cases do not appear to lay down any principle inconsistent with the views expressed above, and as the sections of the Code are expressed in language different from that used in clause 23, Cotton Cloth and Yarn (Control) Order, 1943, and are directed to different objects, no useful purpose would be served by an examination of the cases. It may be observed that section 230 of the Code provides that if the offence stated in a new or altered charge is one for the prosecution of which previous sanction is necessary the case shall not be proceeded with until such sanction is obtained

> "unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded."

The latter words indicate that the Legislature contemplated that sanctions under the Code would be given in respect of the facts constituting the offence charged.

It was argued by Mr. Megaw, though not very strenuously, that even if the sanction was defective the defect could be cured under the provisions of section 537 of the Code of Criminal Procedure which provides, so far as material, that no finding, sentence or order passed by a Court of competent jurisdiction shall be altered or reversed on account of any error, omission or irregularity in any proceedings before or during the trial, unless such error, omission or irregularity has, in fact, occasioned a failure of justice. It was not disputed that if the sanction was invalid the Trial Court was not a Court of competent jurisdiction, but Mr. Megaw contends that there was in this case a sanction, and that the failure of the Crown to prove the facts on which the sanction was granted amounted to no more than an irregularity. Their Lordships are unable to accept this view. For the reasons above expressed the sanction given was not such a sanction as was required by clause 23, Cotton Cloth and Yarn (Control) Order, 1943 and was, therefore, not a valid sanction. A defect in the jurisdiction of the Court can never be cured under section 537.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the Order of the High Court of Judicature at Bombay

dated 5th September, 1946, be set aside and the order dated 21st August, 1945, of the City Magistrate of Sholapur acquitting the accused and ordering the property before the Court to be returned to the person concerned from whom it was attached, be restored.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SHAHABUDDIN.

Yamujala Mangamma and another .. *Petitioners**

v.

Kalyanapu Appadu and another .. *Respondents.*

Madras Estates Land Act (I of 1908 as amended), section 3 (2) (d)—' Estate '—Inam village consisting of two portions—Separate grants before and at the Inam settlement—Tenant of one portion of lands—Whether entitled to occupancy right—Compliance with order returning plaint for presentation to the Revenue Court—If bars application to revise order returning the plaint.

Where two parcels of lands comprised in an inam village were treated even before the inam settlement as separate grants and at the time of the settlement the lands were confirmed under two title deeds,

Held, that the lands comprised under one of the title deeds did not form part of an ' estate ' within the meaning of Madras Estates Land Act, and that the tenant thereof could not claim occupancy rights.

Where the landlord filed a suit in the Civil Court for ejectment and mesne profits treating the person in possession as a tenant wrongfully remaining in possession and the tenant raised the objection that he was an occupancy tenant within the meaning of the Madras Estates Land Act and thereupon the Court returned the plaint for presentation to the Revenue Court, and the plaintiff complied with the Court's order by presenting the plaint in the Revenue Court but at the same time preferred a Civil Revision Petition to the High Court against the order returning the plaint,

Held, that it could not be contended that the revision petition was not maintainable merely because the plaintiff had in obedience to the Civil Court's order presented the plaint to the Revenue Court.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the District Court of Vizagapatam, dated 2nd December, 1944, and made in C.M.A. Nos. 26 and 27 of 1944 respectively (O.S. Nos. 98 and 97 of 1943 respectively, D.M.C., Vizianagaram).

B. V. Ramanarasu and *T. V. R. Tatachari* for Petitioners.

Kasturi Seshagiri Rao and *K. Sivaprasada Rao* for Respondents.

The Court delivered the following

JUDGMENT.—These revision petitions arise out of O.S. Nos. 97 and 98 of 1943 in the Court of the District Munsiff of Vizianagaram which had been filed with regard to two different plots of land in Seetharamudupeta Agraharam of the Vizianagaram taluk. The plaintiff in O.S. No. 98 was one Mangamma, who claimed to be the owner of the plots and treated the defendants in that suit as tenants holding over. The other suit was filed by Mangamma's lessee against the sub-lessees. The defence in both the suits was that the suit land was part of an estate, that the defendants had therefore occupancy rights and the Civil Court had no jurisdiction. The learned District Munsiff accepted this contention and returned the plaints for presentation to the Revenue Court. The District Judge on appeal confirmed the order in O.S. No. 98 of 1943, but with regard to the other suit while accepting the finding of the trial Court that the land concerned in it formed part of an estate, he was of the opinion that as the contest in that case was between the lessee of the

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* C.R.Ps. Nos. 881 and 882 of 1945. 25th April, 1947.

landholder and his sub-lessees the question of occupancy right did not arise unless the sub-lessee could be regarded as a ryot within the meaning of that expression in the Estates Land Act. He therefore remanded the suit for the determination of that question. It is stated that on remand the Munsiff held that the sub-lessees were ryots and that the order returning the plaint became final. The order of the District Munsiff returning the plaints was passed on 22nd April, 1944. The appeal by Mangamma was dismissed on 2nd December, 1944, while the order of the Munsiff after remand in the other suit was passed on 22nd December, 1944. On 2nd January, 1945, the plaintiffs re-presented the plaints in the Revenue Court and obtained decrees. They filed suits in the Revenue Court for rent of the subsequent faslis also and realised a portion of the amount due. In the meantime they filed these revision petitions within the time allowed by law.

Two preliminary objections are raised by the respondents. One is that the revision petitions cannot be heard in view of Madras Act XVII of 1946 and the other that the petitioners having filed suits in Revenue Courts not only for the faslis covered by the civil revision petitions but also for the subsequent faslis are barred from questioning the decision of the Courts below. It is contended on behalf of the petitioners that Act XVII of 1946 does not apply to this case. As regards the other point it is argued that the suits had been filed not only for rent but for possession and though decrees were obtained for rent still the relief of possession has yet to be granted and that is why the revision petitions have been filed, and that their having obeyed the order of the Courts below and presented the plaints in the Revenue Courts does not debar them from filing these petitions. It is said that they obeyed the order of the lower Court because they could not be certain as to when the revision petitions would be heard and disposed of, that as a matter of fact they have not been disposed of till now and they could not possibly take the risk of their claim for rent getting time-barred as the period spent in pursuing the matter in the revision would not be excluded under section 14 of the Limitation Act.

In my opinion the preliminary objections have to fail. Act XVII of 1946 grants protection to the ryots under the Estates Land Act in respect of the sale of the holding. The reasons given for their having obeyed the order of the Court when the plaints were returned to them are sound. No decision has been cited on behalf of the respondents to show that the right of bringing this matter to this Court in revision is barred if the order returning the plaint is obeyed. On the other hand, in *Satyanarayanamurthi* v. *Maharajah of Pithapur*[1], it was held that where a person files suits in a Civil Court for ejectment and mesne profits treating the person in occupation as a tenant continuing wrongfully in possession after notice to quit but the plaints were returned to be presented to the Revenue Court on the defendants contending that they had the kudivaram rights as all the lands were part of an estate and the plaints when returned were presented forthwith in the Revenue Court but the claims for faslis beyond three years had become barred, section 14 of the Limitation Act would not apply with regard to those faslis.

Before setting out the contentions of the petitioners on the merits it is necessary to refer to certain entries in Ex. P-8; the extract from the Inam register relating to Sitharamudupeta Agraharam which is the only evidence adduced in this case on the question whether the land concerned in the suits formed part of an estate. This extract is headed " an extract from the register of inams in the village of Sitharamudupeta Agraharam in the taluk of Vizianagaram in the District of Vizagapatam." In columns 12 and 13 which are intended for the particulars of the original sanad and the name of the original grantee the entries are " No sanad ", " not known ". In column 1 the entry is " 1. Personal " and the extent declared under old inams is shown as nil. The note of the Inam Deputy Collector however is that the five vrittis of the total Gudikat shown in the extract belonged to a temple

1. (1939) 2 M.L.J. 329.

and had been treated as devadayam grant in all the accounts which formed a separate kandam or portion and that the two extents, *i.e.*, the five vrittis and the rest of the extent were recommended to be confirmed by separate title deeds to be continued as long as the pagoda was in good order and the service therein was performed. The order of the Inam Commissioner was approved and confirmed as recommended in one deed excluding the pagoda grant which was confirmed separately. Quit rent for enfranchisement Rs. 180. Title deed No. 866. The 5 vrittis are continued to the pagoda value 450 pays jodi of Rs. 20. Title deed No. 867.

The learned District Munsiff set for himself the question for determination in these words:

> "The whole question in this case turns upon the point whether these 5 vrittis constituted a separate and independent grant in favour of the temple before or at the time of the grant of this agraharam or whether it was a grant subsequent to the grant of the whole village as an agraharam. In the first case this grant cannot be said to be a grant of the whole village because 5 vrittis of it were already granted to the temple separately and it is only the rest of the village that could be deemed to be the subject-matter of the agraharam grant. In the second case the grant being of the whole village first and subsequently 5 vrittis out of it having been carved out for the use of the temple the original grant must be construed to be of a whole village. What is it that was granted is the question?"

After dealing with the recitals in the inam extract he observed that the point to be decided was not free from difficulty and that the documents filed were not unambiguous. He however came to the conclusion that the grant was of a whole village because of the entry in column 1 which as stated was "1 Personal". This entry, he thought, would not have been made if there was another grant as a religious endowment. He also considered that as the extent deducted under the old inams was 'nil' there was no justification for concluding that there was a separate grant in respect of a portion of the village. As regards the accounts referred to in the observation of the Inam Deputy Collector as accounts shewing that the 5 vrittis were treated as a separate devadayam grant, he observed that

> "if there was any such earlier accounts prior to date of the grant of the agraharam and if those accounts do not relate to the agraharam village accounts referred to in column 3 then there would have been the information relating to who granted and the name of the original grantee and so on and those accounts would have been mentioned in the other columns."

He therefore considered that this did not help the plaintiff. The learned District Judge did not deal with this matter at length but expressed his agreement with the views of the District Munsiff. He held that the five vrittis did not constitute a separate grant at the time of the original grant but represented endowments made subsequently. The fact that at the time of the confirmation two title deeds were given for these two separate extents or in other words the confirmation was not as a single grant but as two separate grants was not considered by either Court.

The contentions of the learned advocate for the petitioner are these: (1) The very fact that the heading of the extract is "extract of inams in the village of Sitharamudupeta Agraharam" indicates that what was mentioned in the extract Ex. P-8 was not the whole extent of that village but that there were other inams also. The amendment of 1945 will not apply inasmuch as the grant cannot be said to have been expressly of the village of Sitharamudupeta Agraharam. There is no evidence as a matter of fact as to what the total extent of that village was and having regard to the observations of the learned District Munsiff that the matter was not free from difficulty and the documents were not unambiguous, the decision should have been in favour of the plaintiff as the burden in these cases lay on the defendants, the ordinary presumption being that the Civil Courts have jurisdiction. In any case the note made by the Inam Commissioner clearly indicates that the old accounts showed the five vrittis as a separate devadayam grant. This circumstance in itself is sufficient for rejecting the claim of the defendants that the grant was of a whole village. (2) Even if it considered that the original grant was of the whole village there can be no doubt that at the time of the confirmation, *i.e.*, the inam

settlement the whole village was not regarded as a single inam but as two distinct inams and therefore the lands in question do not form part of an estate. On behalf of the respondents reliance is placed on the grounds given by the learned District Munsiff in his judgment.

The definition of the word "estate" in the Estates Land Act given in section 3 (2) (*d*) is this:

"Any inam village of which the grant has been made, confirmed or recognised by the British Government notwithstanding that subsequent to the grant the village has been partitioned amongst the grantees or the successors in title of the grantee or grantees."

As stated already that the lands in question came within this definition was the case of the respondents and it is conceded by their learned advocate that the burden of proving this lay on them—see *Ramayya* v. *Lakshminarayana*[1]. The learned District Munsiff appears to have been in doubt as to what the nature of this grant was and if there be any doubt with regard to this matter the respondents have to fail. From Ex. P-8 it cannot definitely be said that the original grant was of the whole village of Sitharamudupeta Agraharam. The heading which has been referred to already is significant. The word 'in' does indicate that there were other inams also in that village. In *Suri Reddi* v. *Agnihotrudu*[2], relied upon by the petitioner with regard to a similar heading it was observed that it itself indicates that various lands in the village were held under inam grants. However there can be no doubt that accounts before the inam settlement indicated that a block of five vrittis was treated as a separate devadayam grant. In my opinion this observation of the Inam Deputy Collector is very important indeed. From the fact that two title deeds were issued in respect of this village and the accounts prior to the settlement showed that there were two grants considered with the circumstance that the entries with regard to the particulars of the original grant as well as the name of the grantee are not available, it appears to me that there is sufficient justification for the conclusion that from the beginning there were two grants. In any case the second contention of the learned counsel for the petitioner has to prevail. According to the definition of an estate mentioned above what has to be seen is whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion. It is very clear from the entries in the extract to which reference has been made that at the time of the inam settlement, *i.e.*, when the inam was recognised by the Government the extent mentioned in this extract was not treated as a single grant. In *Viswanatham Brothers* v. *Subbaiya*[3], where an entire village had been granted to a person by way of inam and after the original grant the grantee had made a grant of a portion of it which was treated as a minor inam and the question that arose was whether a lessee of a piece of land was a tenant of an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, Kuppuswami Aiyar, J., held that merely because the land in question formed part of the original grant of an entire village it could not be said that at the time when it was recognised it was part of the inam which was recognised or confirmed by the British Government and hence the land in question was not a part of an estate. He observed:

"The answer to the question as to whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion is the basis for the decision as to whether the land was an estate or not."

In C.R.P. No. 727 of 1945 where the facts were similar Happell, J., agreed with Kuppuswami Aiyar, J. I with respect agree with the view expressed in these decisions. In both these cases there were two title deeds issued at the time of the Inam Commission and in those cases the original grant was of a whole village. In the present case as stated already the accounts prior to the inam settlement indicated to the Inam Commissioner that the two extents were treated as two separate grants, thereby indicating that the grant was not a single one at the outset.

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1. (1934) 67 M.L.J. 1 : L.R. 61 I.A. 177 : I.L.R. 57 Mad. 443 (P.C.).
2. (1943) 2 M.L.J. 528.
3. (1945) 1 M.L.J. 443.

However there were two title deeds at the time of the settlement. In my opinion these decisions apply to the facts of this case also and the lands in question did not form parts of an estate.

I therefore consider that the Civil Courts had jurisdiction to try the suits. The order returning the plaints for presentation to the Revenue Courts is therefore set aside. The District Munsiff will take the suits on file and dispose of them according to law and the findings he has already recorded and also after taking into consideration any realisations made under the decrees obtained by the petitioners in the Revenue Courts. The civil revision petitions are allowed with costs—one advocate's fee.

B.V.V. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Rao Sahib Sriman Mudumbi Venkata Ranga Anaharachariar .. *Appellant.*

v.

Sri Manyam Kanakayya Zamindar Garu .. *Respondent.*

Madras Estates Land Act (I of 1908) *sections* 213 *and* 189 (1)—*Suit by ryot for recovering sums collected from him by the landlord by abuse of the process provided by the Act—Falls under section* 213 *and must be brought before the collector and Civil Courts have no jurisdiction—Sections* 135 *and* 136—*Scope.*

Disputes arose regarding the rents payable in respect of the lands in a holding and the landlord tendered certain pattas for faslis 1350 and 1351 which the ryot refused to accept as not being valid or proper. Thereupon the landlord issued notices of demand for payment of the arrears of rent which according to him were due for those faslis and the ryot, with a view to avoid a distraint, paid the amounts claimed under protest intimating at the same time his intention to recover the sums paid as money illegally collected from him. The ryot accordingly brought a suit in the Civil Court for recovery of the amounts "as money had and received by the defendant for the plaintiff's benefit." It was contended that by section 189 of the Madras Estates Land Act the suit was excluded from the jurisdiction of the Civil Courts

Held: (*i*) Sections 135 and 136 of the Estates Land Act must be read together and those provisions are designed to put an end to unauthorized collections by landholders of "additional payment" in cash or kind which are distinct from and form no part of the rent or the consideration for the use or occupation of the land. The suit cannot be regarded as one falling under section 136 which does not cover excessive collections of rent.

(*ii*) The illegal demand notices issued by the landlord followed by the receipt of the amounts paid by the ryot under protest were "proceedings taken under colour of this Act" within the meaning of section 213 (1).

(*iii*) The suit, whether it be called one for money had and received or one for compensation or one to enforce the obligation declared by section 72 of the Contract Act is one for damages under section 213.

(*iv*) No Civil Court in the exercise of its original jurisdiction shall take cognisance of such a suit as it could undoubtedly be brought before the collector under section 213.

Case-law reviewed and *Ramji Das Aiyar* v. *Nainar Rowthan*, (1931) 61 M.L.J. 395 approved.

Appeal against the decree of the District Court, West Godavari in A.S. No. 511 of 1944, presented against the decree of the Court of the Special Agent, Kovvur in O.S. No. 24 of 1943, etc.

The case came on for hearing in the first instance before Rajamannar, J., who made on 10*th April*, 1947 *the following order of reference to a Bench:*

The only point which arises in the second appeal and in the revision petition is whether the suit instituted by the appellant and the petitioner for recovery of the money paid by him to the respondent under threat of distraint is maintainable in a Civil Court? This depends upon the construction of section 213 of the Madras Estates Land Act. The Lower Courts have held that the suit falls within sub-section (1) of section 213 and is therefore cognizable only by the Collector.

The point at issue is, shortly, whether a suit for recovery of rent illegally collected is a suit for damages. The point is directly covered by the decision of Krishnan Pandalai, J., in *Ramji Das Aiyar*

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*S.A. No. 2248 of 1945 and C.R.P. No. 266 of 1946. 21st November, 1947.

v. *Nainar Rowthan*[1]. The learned Judge there held that where money is by the process provided by the Madras Estates Land Act unlawfully collected as rent by a landlord from a tenant, a suit by e latter for its recovery together with interest, whether it be called one for money had and received or one for compensation or one to enforce the obligation declared by section 72 of the Contract Act, is one for damages within the meaning of section 213 of the Estates Land Act and the Civil Court has no jurisdiction to entertain the same. There is another decision of the same learned Judge to the same effect in *Raja of Ramnad* v. *Ramanatha*[2], but it carried the matter no further.

The learned Judge relied for his conclusion mainly on the observations of the learned Judges in *The Rajah of Vizianagaram* v. *Narasimharaju*[3]. and certain remarks in *Narayanaswamy* v. *Venkataramana*[4]. In the case, *The Rajah of Vizianagaram* v. *Narasimharaju*[3], certain lands belonging to the plaintiff were attached as belonging to defendants 2 and 3 and for arrears of rent due by them. The plaintiff to save his lands from being sold paid the rent due under protest and instituted a suit for recovering that amount. The learned Judges differed on the question whther the suit was maintainable in a Civil Court having regard to the provisions of section 213 of the Madras Estates Land Act. Seshagiri Aiyar, J., held that the suit was maintainable in a Civil Court both on the ground that section 213 applied only where the relationship of landlord and tenant subsisted and on the ground that a person whose property is sought to be sold wrongfully and who pays the money to save it from sale, has a right of suit independent of the Estates Land Act for money had and received.

Bakewell, J. held that the suit was covered by the provisions of section 213 of the Estates Land Act and therefore the Civil Court had no jurisdiction. He held that the suit was one for damages, and observed :" Clearly the 1st respondent's remedy was under section 72 of the Contract Act for repayment of money paid under coercion as against first respondent and his suit would be one for damages. Under the English Common Law an action on the case would lie under these circumstances upon an implied *assumpsit* and the measure of damages would be the amount paid by the plaintiff.".

Now it is clear that the observations of Bakewell, J., can no longer be deemed to be sound law in view of the subsequent decisions of this Court and in particular the decision reported in *Municipal Council, Dindigul* v. *Bombay Co., Ltd.*[5]. It was pointed out in this decision that a suit for money had and received really rests on an equitable doctrine independent of *assumpsit* which made the return of the money obligatory *ex aequo et bono*. It was, therefore, held that a suit for recovery of tax illegally collected by a municipality could not be a suit for " damages and compensation " within the meaning of section 350 of the District Municipalities Act, Madras.

Pandalai, J., also relied on certain remarks made in the decision of the Full Bench in *Narayanaswamy* v. *Venkataramana*[4], at pages 248 and 250. Sadasiva Aiyar, J., said at page 248 : " In other words, clause 2 of section 213 saves the Civil Court's Jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies (such as injunction, declaration, possession, etc.), if any, open to the plaintiff under the ordinary Law".

Srinivasa Aiyangar, J at page 250 said :

" Persons deeming themselves aggrieved by proceedings taken under colour of the Act are not confined to relief by way of damages. They may be entitled to ask for other reliefs such as an injunction, declaration, or recovery of the specific property."

With great respect to the learned Judge Pandalai, J., I fail to see how these remarks lead to the conclusion that a suit for recovery of money collected under threat of illegal distress is a suit for damages. On the contrary Srinivasa Aiyangar, J., suggests that a person aggrieved by proceedings taken under colour of the Act is not confined to relief by way of damages and he may be entitled to other reliefs, and one of the reliefs he states is the recovery of the specific property. I would also include recovery of money illegally levied.

For these reasons I consider that the decisions in *Ramji Das Aiyar* v. *Nainar Rowthan*[1], and *Rajah of Ramnad* v. *Ramanatha*[2], require reconsideration. The second appeal and the civil revision petition will, therefore, be posted before a Division Bench.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Appellant.

M. Appa Rao for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This second appeal and the connected civil revision petition raise a question of jurisdiction.

The appellant who is the Petitioner in the Revision Petition is a ryot holding lands in certain villages of which the respondent is the land-holder. Disputes arose regarding the rents payable in respect of the lands and the respondent tendered

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1. (1931) 61 M.L.J. 395.
2. A.I.R. 1931 Mad. 609.
3. (1916) 3 L.W. 517.
4. (1915) 29 M.L.J. 607 : I.L.R. 39 Mad. 239 (F.B.).
5. (1928) 56 M.L.J. 525 : I.L.R. 52 Mad. 207

certain pattas for fasils 1350 and 1351 which the appellant refused to accept as not being valid and proper. Thereupon the respondent issued notices of demand for payment of the arrears of rent which according to him were due for those faslis, and the appellant, with a view to avoid a distraint, paid the amounts claimed under protest intimating at the same time his intention to recover the sums paid as money illegally collected from him. He accordingly brought the two suits O.S. No. 24 of 1943 in the Court of the Special Assistant Agent, Kovvur on the Civil Side and O.S. No. 261 of 1943 in the Court of the District Munsiff, Rajahmundry, out of which the second appeal and the Civil Revision Petition respectively arise, for recovery of those amounts "as money had and received by the defendant for the plaintiff's benefit." The respondent raised a preliminary objection that the suits being, in their true character, suits "for damges" falling under section 213 (1) of the Madras Estates Land Act, 1908, as subsequently amended, were excluded from the jurisdiction of the Civil Court by section 189 of the Act. This objection prevailed and the plaint in each case was returned to be presented to the proper Court. After unsuccessful appeals to the District Court of West Godavari in the one case and to the Sub-Court, Rajahmundry, in the other, the appellant has preferred the second appeal and the Civil Revision Petition.

The cases were heard in the first instance by Rajamannar, J., who considered that the decisions of Pandalai, J., in *Ramji Das* v. *Nainar Rowthan*[1], and *Rajah of Ramnad* v. *Ramanatha*[2], which the Courts below had followed and which directly cover the point raised, required reconsideration in the light of certain later rulings of this Court. The learned Judge accordingly directed the cases to be posted before a Division Bench.

At the hearing before us each side raised a new contention which if accepted would make it unnecessary to reconsider the decisions of Pandalai, J., referred to above. Mr. Appa Rao on behalf of the respondent contended that apart from the applicability or otherwise of section 213 to the case, the suits must, according to the allegations in the plaint, be regarded as suits for recovery of "excess payment" falling under section 136 of the Act and as such being triable by the collector they are excluded by section 189 from the jurisdiction of the Civil Courts. Our attention was called to the fact that the heading of the chapter in which sections 135 and 136 are placed was altered by the Amending Act of 1934 from "Illegal Cesses" into "Recovery of Excess Payment", and it was suggested that the alteration had the effect of enlarging the scope of section 136 so as to include suits for recovery of rents collected in excess of what was lawfully payable. Though the appellant has sued for the recovery of the entire amount collected from him, the suits, it was said, should be considered as suits for recovery of excess rent collected from him, as his case was that *no* rent was payable by him in the circumstances. We are unable to accept this contention. Section 135 and section 136 should be read together. Section 135 prohibits the taking, receiving or exacting from the ryots "under any name or under any pretence anything in addition to the rent lawfully payable" and declares all stipulations and reservations for such "additional payment" to be void, and section 136 provides for the recovery by the ryot, by suits before the Collector, of "the amount or value of what has been so taken, received or exacted," together with a penalty in the case of exaction. These provisions are clearly designed to put an end to unauthorised collections by landholders of "additional payment" in cash or in kind which are distinct from and form no part of the rent or the consideration for the use or occupation of the land. The provision for the imposition of a penalty in cases of exaction of such payments also supports the view, for it cannot be supposed that the mere collection of a larger sum than what is found to be really due in a case of dispute as to the amount of rent was intended to be penalised. We are therefore of opinion that section 136 does not cover excessive collections of rent and that the present suits cannot be regarded as suits falling under that section.

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1. (1931) 61 M.L.J. 395. 2. A.I.R. 1931 Mad. 609.

On the other hand Mr. Krishnaswami Aiyangar for the Appellant contended that in asmuch as the appellant paid the amounts claimed as arrears under protest and thus averted an actual distraint of his property, he cannot be said to be a person aggrieved " by any proceedings taken under colour of this Act," and the suits do not therefore fall under section 213 so as to be excluded from the jurisdiction of the Civil Courts. We see no force in this contention. Section 78 requires that " before or at the time when a distraint is made " the landholder or his duly authorised agent shall serve on the defaulter in the prescribed time and manner a written demand setting forth the particulars specified in the section together with an account exhibiting the grounds on which the demand is made, and section 79 (1) which provides for actual distraint says that, " unless the demand is immediately satisfied " the distrainer may distrain property to the amount of the arrear with interest and costs of the distress and " shall forthwith prepare a list or description of the said property " and " without delay " serve it on the defaulter together with a copy of the written demand. These provisions show that the statutory demand under section 78 is the first essential step in the process of distraint, to be followed "forthwith" where such demand is not "immediately satisfied " by the further steps indicated leading to the actual distraint and sale of the property. It is admitted in the plaint that the appellant was served with " demand notices " for payment of the arrears claimed, and though these notices have not been exhibited, it was not seriously disputed that these were sent in accordance with section 78. The term " proceeding " is not restricted in its connotation to steps in litigation but is wide enough to include any step taken in a course of action such as distraint of property. We are therefore of opinion that the " illegal demand notices " alleged to have been issued by the respondent followed by the receipt of the amounts paid by the appellant under protest were " proceedings taken under colour of this Act." The appellant being admittedly a person aggrieved by the action of the respondent the present suits brought by him would come within section 213 (1) unless they are excluded from its scope by reason of such suits being regarded under the general law as suits for money had and received. This brings us to the main question debated before us which turns on the true interpretation of section 213 (1) read with section 189 (1).

Section 213 (1) runs thus :—

> " Any person deeming himself aggrieved (*a*) by any proceedings taken under colour of this Act, or (*b*) by neglect or breach of any of its provisions shall be at liberty to seek redress by filing suits for damages before the Collector."

It will be seen that this provision confers a right to obtain pecuniary redress for certain specified grievances, and such redress is to be had " by filing a suit for damages before the Collector." This is a statutory remedy designed to secure speedy settlement of pecuniary claims in respect of such grievances before Revenue Officers who, in the view of the Legislature, are more qualified to deal with them than ordinary Civil Courts whose jurisdiction is accordingly excluded in regard to those matters. We have already seen that the appellant's grievance comes within the purview of the section and he seeks reparation in money for the loss caused to him by the respondent. It would be strange having regard to the object underlying section 213 and indeed to the scheme and policy of the whole Act, if such a claim were to be excluded from its purview merely because under the general law the remedy for such a cause of action would be a suit for money had and received, a form of action which has been evolved by a process of gradual extension to cover a wide range of pecuniary claims. We are in agreement with the observation of Pandalai, J., in *Ramji Das Aiyar* v. *Nainar Rowthan*[1] :

> " Where money is by abuse of the process provided by the Estates Land Act unlawfully collected as rent by a landlord from a tenant a suit by the latter for its recovery whether it be clled one for money had and received or one for compensation or one to enforce the obligation declared by section 72 of the Contract Act is, in my opinion, one for damages under section 213."

1. (1931) 61 M.L.J. 395.

Strong reliance was placed on behalf of the appellant on the decision in *Municipal Council, Dindigul v. Bombay Co., Ltd.* [1], where it was held that a suit by a company for recovery of tax illegally levied by a municipality was an action for money had and received and not a suit for damages or compensation within the meaning of section 350 of the Madras District Municipalities Act (V of 1920). Coutts-Trotter C.J., was prepared to concede that if an action for money had and received sounds either in tort or implied contract it would be a suit for damages. But the learned Judge was of opinion that the Courts in India are not compelled to regard a suit of that nature as confined within the limits of a suit for money had and received as known to the English common law. He referred to the decision of the Privy Council in a case from Ceylon, *John* v. *Dodwell & Company* [2] and observed :

> " I take it to mean this—that in Courts such as those in Ceylon and those of British India, an action for money had and received may be treated, though the English Common Law cannot treat it, as an action founded on an equity binding on the conscience of the recipient of the money which is shown not to be his. If that be right it follows that the remedy being an equitable one is enforceable because it is binding as *ex aequo et bono* on the conscience of the defendant and cannot possibly be either a suit for damages or compensation."

Madhavan Nair, J., also referred to the same decision as supporting the conclusion that an action for money had and received, " being essentially an equitable action," cannot be regarded as a suit for " damages or compensation." The decision was referred to with approval in *Panchayat Board Tiruvottiyur* v. *Western India Matches* [3], which arose under section 225 of the Local Boards Act (XIV of 1920).

In *John* v. *Dodwell & Company* [2], the manager of the respondent company who had authority to draw cheques on their banking account bought shares on his own behalf through the appellant brokers and paid the latter fraudulently by cheques drawn on the company's account. The brokers received the amount of the cheques without fraud but with knowledge that the manager was without apparent authority drawing on the company's funds. It was held that the suit by the company against the brokers for recovery of the amount of the cheques was a suit " for money received to the use of the plaintiff" within the meaning of section 8 of the Limitation Ordinance (XII of 1871) of Ceylon and was within time as to the cheques received within 3 years prior to the suit. It was contended for the brokers that an action for money had and received was founded on implied or imputed contract, that the company could not sustain such an action without waiving the fraud of the manager and ratifying the issue of the cheques, that such ratification would necessarily involve an affirmance also of the direction by the manager to the brokers to pay the amount over to the owner of the shares bought and that the brokers who had carried out such direction could not be made liable. Their Lordships, however, thought it unnecessary to consider " what is the true view of the scope of the ratification which this action (*i.e.*, the action for money had and received) implies by the English Common Law," as they were of opinion that in Ceylon an action for money had and received might well be extended even to cover cases where the obligation to refund did not arise out of a contract implied or imputed but out of a fiduciary position as in the case before them where the brokers having received the cheques with knowledge of the breach of duty of the manager were under a " transmitted fiduciary obligation to account " to the company. This would seem to explain the reference to " trust funds " which Coutts Trotter, C.J., said he did not " quite understand." If *Ex concessi* where an action for money had and received is founded on obligations arising *quasi ex contractu*, it could be regarded as a suit for damages, it is difficult to see why the fact that in India, as in Ceylon, such an action could also be founded on those arising out of a fiduciary position should exclude it from the category of a suit for damages. There was no question before the learned Judges, any more than there is here, of any fiduciary obligation, and we need not pause to consider whether such an action when founded on a fiduciary obligation can be regarded as a suit for damages. The learned

1. (1928) 56 M.L.J. 525 : I.L.R. 52 Mad. 207.
2. (1918) A.C. 563.
3. (1939) 1 M.L.J. 588 : I.L.R. (1939) Mad. 566 (F.B.).

Judges stressed the "equitable" character of the remedy but it is equitable only in the broad sense explained by Lord Mansfield in *Moses* v. *Macforlan*[1], namely, "founded on the equity of the Plaintiff's case." It is not an equitable action in the sense of seeking relief which Courts of Equity in England alone used to grant such as injunction, specific performance, etc. In India, where, as the learned Judges themselves pointed out, the same Courts exercise jurisdiction over legal and equitable remedies, the "equitable" character (in the wider sense of the expression) of the obligation on which an action for money had and received is founded seems to us to be hardly relevant in considering whether such an action can be regarded a "suit for damages."

However, that may be, those decisions do not, in our opinion, govern the present case which turns on the true construction of a totally different enactment. The question we have here to decide is whether having regard to the general scheme and policy of the Madras Estates Land Act and, in particular, to the object of section 213 a suit by a ryot for recovering sums unlawfully collected from him by the landholder by abuse of the process provided by the Act falls under that section. We think it does for the reasons we have already indicated.

Furthermore, it is worthy of note that the bar of the Civil Court's jurisdiction under section 189 (1) which provides that "no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit might be brought" extends not only to suits of the nature specified in part A of the schedule which includes a suit under section 213 but to *any dispute* or *matter* in respect of which such suit *might be* brought. On the allegations in the plaint a suit for reparation in money for the wrongful act of the respondent landholder might undoubtedly be brought under section 213. If so, a suit for the same relief and arising out of the same dispute but framed as one for money had and received must fall within the absolute prohibition contained in section 189 (1), even if an action of the latter description cannot in strict theory be regarded as a suit for damages.

In the result the second appeal and the Civil Revision Petition are dismissed with costs.

K.S. *Appeal and Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

Shah Banmul Soanmul .. *Appellant**

v.

Shah Harakchand Roopchand .. *Respondent.*

Madras Building (Lease and Rent Control) Act (XV of 1946), sections 9 and 18—Order of eviction passed in revision by Provincial Government under House Rent Control Order, 1945—Cannot be executed pursuant to section 9 of the Act—Section 18, if applies—Notice to party affected—Necessity.

Proceedings commenced and taken on appeal and revision by a landlord for the eviction of his tenant under the Madras House Rent Control Order, 1945, terminated in favour of the landlord by an order of the Provincial Government dated 30th September, 1946, by which the previous dismissal of the landlord's application to the Rent Controller and appeal to the Collector were set aside and the tenant was directed to put the landlord in possession. This order was passed without notice to the tenant. The landlord applied for execution of this order to the Principal City Civil Judge under section 9 of the Madras Buildings (Lease and Rent Control) Act which came into force on 1st October, 1946.

Held, (1) since section 9 enables execution to issue by the Principal City Civil Judge only in respect of orders made under the specified sections of the Act, the order which the landlord obtained against the tenant under the House Rent Control Order, 1945, was not one which is subject to execution pursuant to section 9.

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1. (1760) 2 Burr. 1005.

* L.P.A. No. 14 of 1947. 13th November, 1947.

(*ii*) The proceedings following on the order of the Government of the 30th September, 1946, were not proceedings which could be deemed to have been commenced or to be continued subject to the proceedings of the Act under section 18 of the Act and is not one which can be treated as continuing in force.

(*iii*) The action of the Provincial Government in purported exercise of its powers given by the Control Order under clause 8 (2-A), in setting aside the dismissal of the landlord's application without notice to the tenant was without warrant or justification and was a denial of the ordinary principles of elementary justice.

Appeal under clause 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Lakshmana Rao, dated 12th March, 1947, and passed in A. A. O. No. 3 of 1947 preferred to the High Court against the order of the Principal Judge, City Civil Court, Madras, dated 9th December, 1946, in E. P. No. 1718 of 1946 (G. O. No. 3725 of 1946, Development Dept., Government of Madras, dated 30th September, 1946; L. Dis. H. R. A. No. 127 of 1946, on the file of the Collector of Madras; L. Dis. H. R. A. No. 94 of 1946, on the file of Rent Controller, Madras).

S. Rangaswami Aiyangar for Appellant.

V. V. Srinivasa Aiyangar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is a Letters Patent Appeal against the decision of Lakshmana Rao, J., who dismissed an appeal in execution against the order of the learned Chief Judge of the City Civil Court. The subject-matter of the application in execution was an order for possession to be delivered which was made pursuant to the provisions of the Madras House Rent Contol Order, 1945. The appellant is the tenant of No. 28, Govindappa Naick Street, Madras, in respect of which an order, to which reference is made below, for possession was passed.

The relevant facts are the following: Under the provisions of the Madras Rent Control Order, the landlord, who is the respondent before us, made an application for an order for possession to be given to him, to the Rent Controller. On January 31, 1946, that application was dismissed. An appeal by the landlord against the dismissal was preferred to the Collector who, when the Control Order was in force was the appellate authority. That appeal was dismissed on April 16, 1946. On May 1, following, the landlord presented a petition to the Provincial Government of Madras pursuant to clause 8 (2-A) in revision to set aside the dismissal of his application and praying for an order for possession. No notice of that petition was given to the tenant, the appellant here, no opportunity was afforded to him to be heard in the revision proceedings, but the matter was disposed of by the Government in the absence of the tenant and while he was in ignorance of the proceedings which were being taken. On September 30, 1946, an order was made setting aside the previous dismissal of the application and directing the tenant to put the landlord in possession of the premises on or before November 11, 1946. The tenant was unaware of the order which had been made by the Government until some time later. In purported pursuance of the provisions in that behalf, the landlord applied to the Principal Judge of the City Civil Court to execute the order in his favour directing possession of the premises to be given to him. The learned Principal City Civil Judge, directed execution to issue and, as previously stated, an appeal to this Court was dismissed by Lakshmana Rao, J., and hence this Letters Patent Appeal.

The Control Order terminated on September 30, 1946, the very day upon which the Order of Government was made in the landlord's favour, and thereafter, it is beyond doubt and not in dispute, the Control Order ceased to have any effect of any sort, and, so far as those provisions are concerned, the position was as if they never had existed. The application by the landlord in execution of the order by the Government was made pursuant to section 9 of the Madras Buildings (Lease and Rent Control) Act, 1946. That statute came into force on October 1, 1946, the day after the expiration of the Control Order, and, so far as material,

its provisions took the place of those of the Control Order. Section 9 of the Act is in these terms :

"Every order made under section 7 or section 8 and every order pased on appeal under section 12 shall be executed.

(i) in the City of Madras, by the Principal Judge of the Madras City Civil Court . . . . . as if it were a decree passed by him."

On behalf of the appellant, it was contended that there is no authority, statutory or otherwise, enabling execution to be had in respect of the order which was passed by the Government pursuant to the Control Order which expired on September 30, 1946. There were several other contentions raised in support of the appeal ; but, in light of the conclusion to which one has arrived in regard to that stated, it is unnecessary to consider the other contentions.

Section 9 of the Act expressly enables orders made under the stated provisions of the Act to be executed by the Principal Judge of the Madras City Civil Court. It does not enable other orders to be executed. In that connection, Mr. V. V. Srinivasa Aiyangar, on behalf of the landlord respondent, referred to and relied upon section 18 of the Act which provides as follows :

"(1) All proceedings commenced and action taken under the Madras House Rent Control Order, 1945 . . . . . . and pending at the commencement of this Act, shall so far as may be, be deemed to have been commenced or taken under the corresponding provisions of this Act and be continued subject to the provisions of this Act.

(2) All orders passed or deemed to have been passed under the Madras House Rent Control Order, 1945 . . . . and in which fair rent has been fixed, shall continue in force until they are superseded or modified under his Act by the authority competent to do so."

It was argued that the order of September 30, 1946, is included in either sub-section (1) or sub-section (2) of section 18 or both and was a proceeding which was pending when the Act came into force ; consequently, it must be deemed to have been commenced or taken under the relevant provisions of the Act. That being so, the order becomes executable pursuant to section 9.

The proceedings which had been initiated by the landlord had terminated in an order which was passed by the Government on September 30. It has not been suggested in argument that execution proceedings in relation to that order are a continuation of the earlier proceedings, so that those earlier proceedings were proceedings which were pending at the time when the Act came into force and thus continued thereafter. It was not suggested that when a suit, for instance, for payment of money is decreed, it is pending thereafter. It is manifest that upon its disposal the suit has come to an end. Thereafter, the decree in the suit is enforceable by execution proceedings ; but these execution proceedings are not proceedings in the suit itself, so far as the suit could be deemed to be in any way continuing after the decree. Sub-section (1) of section 18 uses the words "action taken". It is not easy to infer what exactly was meant and intended by the draughtsman when those words were included. The use of the word "action," in relation to the proceedings in Court, is well understood in the Courts in England. The word "action" means the word "suit," as used in this country ; but save in very loose phraseology, the word "action" is not used in this country in regard to proceedings by suit or otherwise. It would seem that those words must mean something apart from proceedings in Court, more especially since the words "all proceedings" are found in sub-section (1) immediately preceding the words "action taken" and probably they relate to some form of notice being given, which is required before proceedings can be formally instituted. They certainly do not, in my view, refer to any form of civil process, since that is covered by the words "all proceedings" previously contained in sub-section (1). The proceedings which sub-section (1) provides, should be continued subject to the provisions of the Act, are proceedings which have been commenced before the Act came into force and which were pending at that moment and no other proceedings. The proceedings which were prosecuted by the landlord before the Rent Controller, the Collector, and the Government had terminated and were no longer pending when the Act came into force. Assistance is obtained from sub-section (2) in ascertaining whether section 18 applies

to the order made on September 30, by the Government. That sub-section provides that all orders passed under the Control Order shall be deemed to be in force, provided only that any such order is one in which a fair rent has been fixed. There is no provision in sub-section (2) that any other order shall continue in force, and if it had been the intention of the Legislature that an order, such as the one in point in the present instance, should continue in force, the sub-section easily could, and indeed would, so have stated. A perusal of the two sub-sections of section 18 of the Act, to my mind, reflects that in so far as the proceedings resulting in the order of the 30th September, are concerned, those were not proceedings which should be deemed to have been commenced or to be continued, subject to the provisions of the Act and the order is not one which must be treated as continuing in force.

It follows that the order is not one which could be or was made pursuant to any provisions of the Act. Since section 9 enables execution to issue by the Principal Judge of the Madras City Civil Court only in respect of orders made under the specified sections of the Act, the order which the landlord obtained against the tenant in the present instance is not one which is subject to execution pursuant to section 9.

It has already been pointed out that recourse cannot be had—and no attempt to do so has been made—to the corresponding provision to section 9 of the Act in the Madras Rent Control Order which has now no force or effect.

Although it does not directly arise, in light of the opinion which has been expressed, it is, I think, desirable to point out that the action of the Government, in purported exercise of its powers given by the Control Order under clause 8 (2-A), in setting aside the dismissal of the landlord's application, by way of revision without giving any opportunity to the person adversely affected by that order to appear before it to show cause against the order being set aside, was one which is without any warrant or justification and was a denial of the ordinary principles of elementary justice.

For the reasons given, in my opinion, this appeal should be allowed with costs of the appellant throughout.

Bell, J.—I entirely agree.

V.P.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad).

PRESENT :—LORD SIMONDS, LORD UTHWATT AND SIR JOHN BEAUMONT.

Saiyed Mazhar Husain and others .. *Appellants.**

v.

Rao Bahadur Adiya Saran Singh .. *Respondent.*

Mahomedan Law—Wakf—Shia law—Absence of wakfnama—No evidence of oral dedication—Circumstances which would satisfy the requirements of Shia Law necessary to the valid creation of a wakf.

In the absence of any evidence as to the execution of a wakfnama and any direct evidence as to any oral dedication, if the proper inference from the history of the matter, dealing with the properties, the litigation that has affected it and the admissions and assertions made by the parties' predecessors-in-title is that they were purchased on the express footing that they were to be an endowment of an existing wakf consisting of a mosque, grove and imambara, all the requirements of Shia Law necessary to the valid creation of a wakf attaching to those properties are satisfied.

A. Pullan for Appellants.

S. P. Khambatta, K. C. and *H. J. Umrigar* for Respondent.

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* P. C. Appeal No. 59 of 1944. 24th July, 1947.

The Judgment of the Court was delivered by

LORD UTHWATT.—This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated the 8th September, 1941, reversing in part a judgment and decree of the District Judge of Cawnpore dated the 4th October, 1934.

The appellants were the plaintiffs in the suit giving rise to this appeal. In it they claimed the removal of the respondent, defendant in the suit, from the trusteeship of certain properties alleged to be wakf properties and consequential relief. The respondent denied that any wakf was ever created. The only question at issue in the appeal is whether the subject of the wakf was, as found by the High Court, a mosque only or was, as found by the District Judge, a mosque, a grove and imambara and two villages endowed for the upkeep of the mosque, grove and imambara. The appellants' case is that a wakf extending to all these properties was created by Haidar Bakhsh. The following pedigree shows the relation between the persons who figure in the history of the matter :—

BHAWANI PRASAD

- Munna Lal
  - Durga Prasad
    - Roshan Lal
      - Rao Lal Bahadur *alias* Matadin (died 1867 A.D.)
        - Rao Iqbal Bahadur (died 1914 A.D.)
          - Fateh Bahadur (died 1916 A.D.)
            - Rao Bahadur Adiya Saran Singh (Respondent)
        - Mewa Lal (died circ. = 1906 A.D.)
  - Ishri Prasad
    - Maiku Lal
- Ram Prasad *alias* Mian Haidar Bakhsh (died S.P. 1837/8 A.D.)

Haidar Bakhash—reputedly a very wealthy man—belonged to a Hindu family but some time prior to 1794 A.D. embraced Islam, remaining nevertheless on good terms with his brother and his brother's descendants. Sometime about 1813 A.D. Haidar Bakhsh built a mosque and imambara and planted a grove known as Imam Bagh. These were in a compound containing residential houses in one of which Haidar Bakhsh lived. The appellants' case is that thenceforward the mosque was used for worship and the imambara for the burial of "Tazias" at the Moharram and for other purposes connected with the Mohammedan religion.

In 1834 the two villages in question—Charli and Jafarpur Sathra—were bought in the name of Maiku Lal, grand-nephew of Haidar Bakhsh, and Lal Bahadur, great-grand-nephew of Haidar Bakhsh, their respective fathers being then living. The names of Maiku Lal and Bahadur Lal were mutated in the village papers as proprietors. Haidar Bakhsh had no Mohammedan heirs. The appellants' case is that this purchase was made by Haidar Bakhsh "benami" to ensure the perpetuity of the wakf consisting of the mosque, grove and imambara.

Haidar Bakhsh died in 1837/1838 A.D.

There is no evidence that Haidar Bakhsh ever executed a wakfnama and no direct evidence of any oral dedication by him. But if the proper inference from the history of the matter, the dealings with the properties, the litigation that has affected it and the admissions and assertions made by the respondent's predecessors

in title is that Haidar Bakhsh purchased the villages in the names of Maiku Lal and Bahadur Lal on the expressed footing that they were to be an endowment of an existing wakf consisting of the mosque, grove and imambara, their Lordships do not doubt that all the requirements of Shia Law necessary to the valid creation of a wakf attaching to the villages were satisfied.

The matter to be determined is merely one of the proper inference to be drawn from facts none of which is now in dispute. In the principles to be applied and the method of approach to be followed their Lordships are in agreement with the High Court. They differ from the High Court as to the conclusion which ought to be drawn from the material proved in the case. The elaborate and careful statement of the facts contained in the judgment of the District Judge and the High Court relieves their Lordships from the need of stating much of the detail.

Three important matters may be summarily disposed of. First, their Lordships are satisfied that the villages were purchased by Haidar Bakhsh. That was admitted by counsel for Iqbal Bahadur in a suit in 1875 and the admission accords with all the probabilities of the case. The District Judge found that the villages were so bought and his view was not in terms dissented from by the High Court. Second, the oral evidence established to the satisfaction of the District Judge that until recent years the imambara as well as the mosque was open to the public and was generally used by the public. This finding of fact was accepted by the High Court and was not open to dispute before their Lordships. Third, it is not disputed that for many years the income from the villages has been expended wholly or in part on the upkeep of the mosque and imambara by the respondent's family. Oral evidence was led on this topic to which it is not necessary to refer. In addition it was shown that in a former suit relating to the wakf there was evidence given in 1875 by Sahib Ali Khan, tahsildar from 1858 to 1868, in the district of Fatehpur (the relevant district), that the income during his time as such tahsildar was "spent on Taziadari, etc." There is nothing in the history of the case which suggests that the spending of the income for the purpose of the wakf alleged represented a change from a practice that had existed from the time of Haidar Bakhsh. Their Lordships draw the inference that the practice existed throughout.

The documentary evidence is dealt with in considerable detail in the Courts below. The respondent mainly relies on the facts :—(1) that Maiku Lal and Lal Bahadur were entered in the village papers as proprietors and that Haidar Bakhsh made no attempt to have mutation effected in the name of the Almighty and to have Lal Bahadur and Maiku Lal recorded as *mutuwallis* in lieu of proprietors ; (2) that leases of the villages made in 1834 and 1839 made no mention of a wakf ; (3) that Maiku Lal affected to deal with his half share in the villages as if he were absolute owner ; (4) that in the khewats of 1863 and 1864 Lal Bahadur is recorded as proprietor notwithstanding that he had asserted in 1861 that he was in possession as trustee and that the villages were being devoted to sacred purposes ; (5) that in the khewat of 1875 Iqbal Bahadur and his minor son are recorded as *pattidars*.

The point made is that in the earlier history of the villages—down to 1861 or thereabouts—there is not to be found any statement in any written instrument that the villages were wakf property.

The appellants produce against this the fact that in the Settlement of 1875 A.D. the wajib-ul-arz for each village states in terms : "the village has been made a wakf for Taziadari during Moharram, repairs of imambara and mosque." Later settlements do not, however, make mention of any wakf. The appellants mainly rely upon admissions, or more accurately, assertions made in various proceedings relating to the villages by the respondent's predecessors in title.

It appears that from the year 1873 onwards a series of suits was brought by persons claiming to be Mohammedan heirs of Haidar Bakhsh. In these suits Iqbal Bahadur and Mewa Lal consistently asserted that these villages were wakf created by Haidar Bakhsh. These assertions are open to the criticism that they may have been devices to which resort was made with a view to defeating Muslim claimants

but, with the High Court, their Lordships consider that these statements cannot entirely be put out of account. It may be added that in one of these suits in the year 1877 a detailed statement was made by Iqbal Bahadur and the guardian of Mewa Lal, then a minor, that in 1853 Maiku Lal applied for partition of the villages but that the application was struck off owing to the fact that the properties were proved to be wakf properties. The dates of the Courts' orders are given specifically as the 19th April, 1860 and 31st July, 1861. The orders were not apparently produced in evidence.

There is one suit (Case No. 421 of 1860) to which it is necessary to refer in more detail. It appears that Maiku Lal affected to sell his share in the villages to one Sheo Dayal who in execution proceedings against Maiku Lal obtained an order for possession of Maiku Lal's share on the 1st December, 1859. Lal Bahadur entered a demurrer under Act, VIII of 1859—the then Civil Procedure Code—claiming that the villages were devoted to sacred purposes by the ancestors of both parties and that, as he was in possession as trustee and received the rents "under the ruling of the S.D.A. No. 1166 dated the 17th August, 1838," the property could not be alienated. The Subordinate Judge decided in favour of the demurrer. Sheo Dayal appealed to the District Judge who found also for the demurrer. He observed that the revenue authorities on 21st May to 6th October, 1853, declared that Maiku Lal was out of possession and he found that the property was really devoted to sacred purposes. He dismissed the appeal. An appeal to the Sadar Diwani Adalat was dismissed the Court stating " the estates were wakf (the father of Lal Bahadur we observe was a proselyte from Hinduism to Mohammadanism)."

In their Lordships' view the High Court did not attach proper weight to this case in arriving at a conclusion upon the matter. The errors in the report were emphasised to the neglect of the importance of the decision itself.

The only discernible errors of fact in the report of the decision are :—(1) that Lal Bahadur is referred to as the son of Haidar Bakhsh and Haidar Bakhsh is consequently referred to as an ancestor of Lal Bahadur, and (2) that Haidar Bakhsh is referred to as the brother of Maiku Lal. But it is clear (1) that the convert to Islam—Haidar Bakhsh—came into consideration as the person responsible for the dedication to wakf if such a dedication was made ; (2) that the question whether or not there had been such a dedication was directly in issue; (3) that evidence on the point was taken ; and (4) that the point was decided.

That is a general summary of the effect of the evidence. The critical question is whether the villages were dedicated by Haidar Bakhsh as a wakf. If they were the conclusion is inevitable that the mosque, imambara and grove were also so dedicated.

In considering the evidence as to the villages their Lordships do not attach to the documentary evidence prior to 1861 relied on by the respondents the weight attributed to it by the High Court. That evidence is undoubtedly consistent with the claim to a proprietary title but does not—and here they differ from the High Court—repel the hypothesis of the creation of a wakf by Haidar Bakhsh. The entries in the village records are not conclusive, though they are of weight. The lease of the villages is not of itself inconsistent with the dedication of the villages as an endowment. No weight can be attributed to Maiku Lal's attempted disposition of his share in light of the findings in the suit No. 421 of 1860. The consistent use of the mosque and imambara and of the profits of the villages for the purposes of the mosque and imambara ; the fact that Haidar Bakhsh found the purchase money for the villages ; Maiku Lal's failure to obtain a partition in the suit which was begun in 1853 ; the admissions and assertions made by the respondent's predecessors in title ; and the judgment in the suit No. 421 of 1860 lead their Lordships to the conclusion that the proper inference in not—as the High Court thought—that there were unenforceable directions given by Haidar Bakhsh that to perpetuate his memory some portion of the income of the villages was to be devoted to the upkeep of the mosque and the imambara, but that the transaction under which the villages were transferred to Lal Bahadur and Maiku Lal was accompanied

by such overt expressions of intention as were necessary to create a wakf attaching to the villages for the endowment of the mosque, grove and imambara. A lawful and effective creation of a wakf is consistent with all the proved facts ; and in their Lordships' view is the proper and reasonable inference from those facts.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the judgment of the District Judge be restored. The respondent will pay the costs of the proceedings in the High Court and of this appeal.

Solicitors for Appellants : *Douglas, Grant and Dold.*

Solicitors for Respondent : *T. L. Wilson & Co.*

V. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

K. V. Narayanan Nair .. *Appellant**

v.

T. P. Kesava Menon and others .. *Respondents.*

Malabar Law—Lease by karnavan of valuable forest lands for a very low rent under the guise of a reclamation lease—Remedy of junior members of tarwad.

Where the karnavan purports to grant a lease which is real but the terms of which are improvident, the remedy of the junior members is only to remove the karnavan in a properly constituted suit. But, where the lease is of valuable forest land for an insignificant rent under the cloak of a reclamation lease there is really no lease at all and the transaction is not within the powers of the karnavan and as such the junior members can sue for and obtain a declaration that the lease is not binding on the Idom.

Abdulla Koya v. Eacharan Nair, (1917) 35 M.L.J. 405 and *Kunhi Kutti Ali* v. *Muhammad Haji*, (1930) 60 M.L.J. 450 : I.L.R. 54 Mad. 239, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, dated 27th October, 1944, in A.S. No. 154 of 1943 preferred against the decree of the Court of the District Munsiff of Alathur, dated 21st September, 1943, in O.S. No. 394 of 1939.

D. A. Krishna Variar for Appellant.

K. Kuttikrishna Menon for 1st Respondent.

The Court delivered the following

JUDGMENT.—The suit out of which this second appeal arises is for a declaration that the lease granted by the second defendant, the karnavan, to the first defendant on the 11th January, 1934, is not binding on the Idom and for possession of the plaint schedule properties. The plaintiff is the receiver appointed in a partition suit, O.S. No. 402 of 1938, between the members of the Idom. The lease comprises 132 acres of forest land and purports to be a reclamation lease for a period of 12 years. It fixes a rent of 5 paras of paddy per year and a renewal fee of Rs. 25. The ground on which the plaintiff seeks to attack the lease is that though it purports to be a reclamation lease, it is not really so but that it is merely a lease of a forest at a very low rent in the guise of a reclamation lease.

The Courts below have held that the lease does not bind the Idom as the lease was not a reclamation lease, but it was so mentioned in the lease as a pretext for alienating forest tract of considerable extent for a long period without any advantage to the tarwad. The purpose of reclamation is introduced in the lease merely as a cloak to give the transaction a semblance of propriety.

It is contended on behalf of the appellant that it is open to a karnavan of a tarwad to grant even an improvident lease, and that such a lease cannot be attacked

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* S.A. No. 862 of 1945. 4th December, 1947.

by the junior members, and that the only remedy if the karnavan persi: suc h improvident leases is to remove the karnavan in a properly c(Reference has been made to the decisions in *Abdulla Koya* v. *Eachat* *Kunhi Kutti Ali* v. *Muhammad Haji*[2]; but, in my opinion, the principle sions has no application to the present case, as it is not a case where purports to grant a lease which is real but the terms of which are imp the present case what is attempted by the karnavan is to invent a cloak ing with valuable forest lands for an insignificant rent. It is found by sioner and also borne out by the evidence that a very little portion o comprised in the lease can really be reclaimed and that there are ab on the land which are useful as timber. In these circumstances it c that the lease is a real lease but is an improvident one. The lease at all of what it purports to be but is wholly a different transaction. T not within the powers of a karnavan, and he is not competent to bin by such a transaction.

The decisions of the Courts below are correct, and the second app with costs.

No leave.

V.P.S. *Ap*

IN THE HIGH COURT OF JUDICATURE AT MAD

PRESENT :—MR. JUSTICE GOVINDA MENON.

Muhammad Abdul Halim Baig .. *Pe*

v.

Muhammad Ali Hussain and others .. *Re*

Receiver—Party appointed as receiver—Right to remuneration.

Subject to a few exceptions, where a party is appointed receiver he is not allowe tion except by consent of parties. Where a party is appointed a receiver for carry operations on a 'seignorage' basis in a hillock, which formed the subject-matter as no special scientific skill or any technical knowledge is necessary, the receiver i any remuneration especially when it is not shown that by utilising his time for the q he has suffered by the loss of his employment or other occupation during that period. entitled to reimburse himself out of the estate. the expenses incurred in the conduct ceedings as receiver.

Re *Bignell*: *Bignell* v. *Chapman*, (1892) 1 Ch. 59; *Bhudulal Jagannath Firm* v. *Hirdag* I.L.R. (1942) Nag. 671 at 673 and *Muhamed Kamil* v. *Hedayetulla*, (1925) 90 I.C. 492

Petition praying that in the circumstances stated in the affida with the High Court will be pleased to fix at ten per cent. of the month the remuneration of the receiver appointed by order of the High Co May, 1947, in C.M.P. No. 2689 of 1947, praying for appointment o Abdul Halim Baig as receiver of the properties forming the sub A.S. No. 360 of 1943, preferred to the High Court against the decre of the Subordinate Judge, Bezwada, in O. S. No. 37 of 1940.

B. Lakshminarayana and *S. Subbiah Chowdri* for Petitioner.

K. Kameswara Rao, *A. Raghavayya*, *Y. G. Krishnamurthi* and *J.* Respondents.

The Court made the following

ORDER.—By the order made in C.M.P. No. 2689 of 1947, my le Shahabuddin, J., appointed the petitioner herein as receiver for t carrying on quarrying operations in a hillock which formed the sub the litigation between the parties on a "seignorage" basis. Vari

1. (1917) 35 M.L.J. 405. 2. (1930) 60 M.L.J. 450 : I.L

* C. M. P. No. 7312 of 1947. 22nd Ja

were given to the receiver and he was ordered to work under the general supervision of the lower Court. Previously, by the order in C.M.P. No. 2424 of 1947, Rajamannar, J., as he then was, had directed, by consent of parties, that the applicant, the present petitioner, may be permitted to carry on quarrying on the suit hillock on a "seignorage" basis; and he was also permitted to employ two watchers at a salary not exceeding Rs. 25 each per month. It is admitted that the petitioner has been carrying on the functions of a receiver. The present application by Mr. B. Lakshminarayana is, that the receiver may be allowed some remuneration for his labour in connection with this quarrying. What exactly the receiver is doing is contained in paragraph 7 of the affidavit of the petitioner, which is in the following terms:

"As receiver I have been conducting two ejectment suits, O.S. Nos. 132 and 133 of 1946, a Bezwada as third parties have encroached upon the foot of the hillock which is the subject-matter of this appeal; and also one possession case No. 22 of 1947 relating to the same subject on the file of the First Class Magistrate, Bezwada. These matters have already been placed before this Honourable Court in the affidavits filed by the receiver in C.M.P. No. 2424 of 1947 (and) C.M.P. No. 2689 of 1947. I have been discharging all these duties to the best of my abilities."

So far as the conduct of suits and other proceedings are concerned, he is entitled to reimburse himself out of the moneys belonging to the estate. I am, however, of opinion that no special scientific skill or any technical knowledge is necessary, for the purpose of acting as receiver. Nothing to this effect has been mentioned in paragraph 7.

In these circumstances, what I have to decide is whether the receiver is entitled to any kind of special pay for utilising a portion of his daily time in supervising the quarrying. The law is well settled both in England and in this country that generally where a party is appointed receiver, he is not allowed a salary unless by consent of parties (*vide* Halsbury's Laws of England, Hailsham edition, volume 28, page 81). No doubt, in England there are exceptions to the general rule, and one of such exceptions is contained in a judgment of the Court of Appeal in Re *Bignell*: *Bignell* v. *Chapman*[1], where Lindley, L.J., discusses the question and lays down that where a trustee has been functioning as a receiver and where that trustee, had been before becoming a receiver obtaining some remuneration, he is entitled to get the same even after he was appointed receiver. Moreover, Lindley, L.J., says that it was a discretion for the trial Judge, North, J., who thought that certain remuneration was reasonable and allowed it. I do not find any justifying reason why the present petitioner who was appointed as receiver on his own application and after opposition from the other parties, is entitled to any kind of special consideration. The Indian decisions, to which my attention has been drawn are those contained in *Bhudhulal Jagannath Firm* v. *Hirdagarh Collieries, Ltd.*[2] and *Muhamed Kamil* v. *Hedayetulla*[3]. Both these decisions lay down the general principle as enunciated in Halsbury's Laws of England and it is also stated that there may be few exceptions to this general rule. The facts set forth in the affidavit of the petitioner cannot be said to constitute any special circumstances which would justify him in asking for a remuneration, for it is conceded that no special, technical or scientific knowledge is necessary for carrying on this quarrying operations; and it is nowhere stated that the petitioner, by utilising his time for supervising this quarrying operations, has, in any way, suffered by the loss of his employment or other occupation during this period. In these circumstances, I do not feel justified in departing from the usual rule by ordering that this party-receiver should be given a special remuneration.

The petition is therefore dismissed.

V.P.S. *Petition dismissed.*

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1. (1892) 1 Ch. 59.
2. I.L.R. (1942) Nag. 671 at 673.
3. (1925) 90 I.C. 492.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

H. Shiva Rao .. *Petitioner**

v.

The Collector of Madras .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 3—*Collector of Madras intimating on receipt of notice of vacancy from the landlord that building is required for Government—Act not judicial but administrative and cannot be quashed by writ of* certiorari.

Under section 3 of the Madras Buildings (Lease and Rent Control) Act, 1946, on receipt of notice of vacancy the Government has to decide whether the building is required for any of the purposes specified in sub-section (2) of section 3 and then to intimate the landlord that they do require the building for such purposes. Such an act of the Government or the officer of government empowered by them in this behalf can in no sense be described as judicial or quasi-judicial. The intimation of their decision is done in a purely administrative capacity. From the fact that an action of government or a public officer may have the effect of prejudicing the rights of private parties it does not follow that such act is necessarily of a judicial nature. The fact that the Collector, who was the officer empowered by the Government in this behalf, clothes his intimation in the form of an order does not make it subject to the jurisdiction of the High Court as if it were an order of a judicial or quasi-judicial tribunal. The person affected is not entitled to the issue of a writ of *certiorari* to quash such order.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and call for the necessary records from the Collector of Madras and to quash the proceedings of the said Collector L. Dis. C. A. No. 452 of 1947 dated 1st October, 1947, allotting premises No. 16, Rajarathnam Street, Kilpauk, Madras, to Dr. C. Satyanarayana for residential purposes.

A. Ramachandran of *Messrs. Row and Reddy* for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) instructed by *K. Veeraswami* and *C. Doraiswamy* for the Government Solicitor on behalf of the Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an application for the issue of a writ of *certiorari* to call for the proceedings of the Collector of Madras, dated the 1st October, 1947, and to quash his order which runs thus :—

"In virtue of the powers vested in him under section 3 (2) of the Madras Buildings (Lease and Rent Control) Act, 1946, the Collector of Madras is pleased to allot premises No. 16, Rajarathnam Street. Kilpauk, Madras, to Dr. C. Satyanarayana, for residential purposes with effect from 27th September, 1947."

The house in question was comprised in the estate of one Rao Bahadur H. Narayana Rao who died leaving behind him a will under which the petitioner was appointed executor. It is alleged in the affidavit filed by the petitioner in support of the application that from about the end of 1942, the premises were occupied by successive officers of Government or by Government institutions. On the 5th February, 1947, one Rao Bahadur R. Madhavachari who had been in occupation of the house vacated it, and the house was assigned to the Hon'ble Mr. B. Venkataratnam, minister to the Government of Madras, with effect from the 5th February, 1947. The order itself was passed on the 8th. In accordance with that order, the Hon'ble Mr. Venkataratnam occupied the premises from the 8th February, 1947, and vacated the same on the 25th March, 1947. Though Mr. Venkataratnam vacated the premises, it appears that the petitioner did not obtain vacant possession of the house. One Anjayya, editor of a Telugu weekly, came to occupy the premises from about the 4th April, 1947. The petitioner attempted to obtain possession of the house for the use of the widow of the late Narayana Rao, the testator; but his attempt was not successful. On the 8th August, 1947, the Collector of Madras required the petitioner to furnish certain particulars regarding the house, and when

* C.M.P. No. 6530 of 1947. 20th January, 1948.

the petitioner had complied with the request, the Collector passed an order on the 27th August, 1947, purporting to allot the house to the Educational Department for use as a hostel. The petitioner protested against the action of the Collector, but he did not get any relief. In supersession of the order of the 27th August, the Collector of Madras passed the order set out above on the 1st October, 1947. It is this last order that the petitioner seeks this Court to quash.

The order in question *ex facie* purports to be passed under section 3 (2) of Madras Act No. XV of 1946. The learned Advocate-General took a preliminary objection that any action taken under that sub-section by the Provincial Government or an officer empowered by them would not be a judicial act and any intimation by the Government or the officer under that sub-section would not amount a judicial order which could be quashed by a writ of *certiorari* by this Court. To appreciate this contention, it is necessary to refer to some provisions of the Act.

Under section 3 (1) every landlord has to give notice in writing to the Controller within seven days after his building becomes vacant that it has so fallen vacant. The Controller, according to section 2 (2) of the Act, is the "person appointed to perform the functions of a Controller under this Act." It has been brought to our notice that in the City of Madras the Personal Assistant to the Collector of Madras is the person so appointed by G. O. No. 3741 dated 30th September, 1946. Sub-section (2) of section 3 runs thus :

> "If, within a week of the receipt of a notice under sub-section (1) by the Controller, the Provincial Government or any officer empowered by them in that behalf does not intimate to the landlord in writing that the building is required by them for any Governmental purposes or for use by any public institution under Government control or any officer of the Government, the landlord shall be at liberty to lease the building to any tenant."

Sub-section (3) is as follows :

> "If the Provincial Government require the building for any purpose specified in sub section (2) the Provincial Government shall be deemed to be the tenant of the landlord as from the date of the receipt of the notice under sub-section (1) and the terms of the tenancy shall be such as may be agreed upon between them :
>
> Provided that the rate of rent shall not exceed the fair rent that may be payable under the provisions of this Act."

It is clear that under sub-section (2) within a week of the receipt of the notice sent by the landlord to the Controller under sub-section (1), the Provincial Government has to decide whether the building is required by them for one or other of the purposes mentioned in that sub-section, and if the Government decide that the building is required for one or other of such purposes, the Government or an officer empowered by them in that behalf should intimate within the said time of one week to the landlord that the building is so required. Once they intimate to the landlord that they require the building for any of the purposes mentioned therein, the landlord is not at liberty to lease the building to any tenant. The only action which the Government or any officer empowered by them can take under sub-section (2) is to intimate to the landlord in writing that the building is required by the Government for a particular purpose. There is no provision in the sub-section for an order to be passed. It is not contemplated that the Government will have to give the landlord a hearing or that they are bound to consider any objections which the landlord may have to the action proposed to be taken by the Government. It is for the Government to decide whether the building is required for any of the purposes and then to intimate to the landlord that they do require the building for such purpose.

Such an act of the Government or of the officer of Government empowered by them in this behalf can in no sense be described as judicial or quasi-judicial. The Government and the officer do not hear evidence or exercise any judicial functions. There is no proposal or opposition before them. The intimation of heir decision to require the building for occupation is done in a purely adminis-

trative capacity. It has been pointed out again and again that from the fact that an action of Government or a public officer may have the effect of prejudicing the rights of private parties it does not follow that such an act is necessarily of a judicial nature (vide *Rex* v. *London County Council. The Entertainments Protection Association*, Ex parte[1]; *Sreenivasa Ayyangar* v. *Hindu Religious Endowments Board, Madras*[2] and *Kaikhushru Sorabji* v. *Commissioner of Police*[3]). The fact that the Collector who was the officer empowered by the Government in this behalf clothes his intimation in the form of an order does not make it subject to the jurisdiction of this Court as if it were the order of a judicial or quasi-judicial tribunal. The petitioner will not, therefore, be entitled to the issue of a writ to quash the order in question.

During the course of the argument, it became apparent that the Government had not kept before them the provisions of the Act and the procedure laid down in the several provisions of the Act in dealing with the premises in question. It is not clear from the documents which have been placed before us both by the petitioner and by the learned Advocate-General on behalf of the Government how exactly the provisions of section 3 of the Act became applicable to the building in question. It is difficult to find any communication from the landlord which could be deemed in law to be a notice in writing to the Controller under section 3 (1) of the Act. Evidently, this was a building which had been in the occupation of one or other of the Government officers even before the Act came into force on the 1st October, 1946. What exactly were the terms of the tenancy at the time when the Act came into force we have no idea of. Thereafter, when the building was occupied by the Principal, Medical College, and was being used as a hostel for the women students of the Madras Medical College, on the 10th October, 1946, we find the Collector addressing the petitioner requesting him to intimate to him, that is, the Collector as soon as vacancy occurred as required under section 3 (1) of the Act. This apparently means that the Collector presumed that the tenancy would terminate as soon as the building ceased to be a hostel for the women students and that the Government as such would not continue to be the tenants. On the 28th October, 1946, with reference to this letter of the Collector, the petitioner wrote a letter to the Principal, Medical College, with a copy to the Collector, in which he acknowledged a communication from him that the women students of the Medical College would be vacating the building on the 1st November, 1946, and that it will be occupied thereafter by the men students of the College. He also stated therein that he agreed to the retention of the premises by Government provided the rent was fixed at Rs. 125 per mensem. This also indicates that both the Government and the petitioner thought that there was no continuous tenancy. Then we find on the 4th November, 1946, the Collector passing the following order:

> "under the provisions of section 3 (2) of the Madras Buildings (Lease and Rent Control) Act, 1946, the premises No. 16, Rajarathnam Street, Kilpauk, Madras, is allotted for residential purposes to Rao Bahadur Sri R. Madhavachari with effect from 30th October, 1946."

The learned Advocate-General, during his argument, contended that this would be the intimation to the landlord under section 3 (2) of the Act. Mr. Madhavachari vacated the building on the 3rd February, 1947. The question would arise if the Provincial Government can maintain that though the purpose for which the building was required, namely, for the residence of Mr. Madhavachari, came to an end, nevertheless the Government continued to be the tenants until they actually chose to surrender possession to the landlord. The learned Advocate-General relied upon the language of sub-section (3) of section 3. That section no doubt fixes the starting point of the tenancy and that is the date of the receipt of the notice under sub-section (1); but there is no indication in that sub-section of the date of the termination of the tenancy. We think it is not unreasonable to consider sub-sections (2) and (3) to mean that if the Provincial Government require a building

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1. (1931) 2 K.B. 215.
2. (1937) 1 M.L.J. 442.
3. A.I.R. 1947 Bom. 153.

for a particular purpose the tenancy would terminate as soon as the building ceases to be required for the purpose specified. It is, however, unnecessary to decide that question in this case.

The provisions of section 3 of the Act are in their nature likely to deprive the landlord of his ordinary right of freedom to choose his tenant. The Government should therefore always take sufficient care to see that the terms of the different sub-sections of the section are followed and the conditions laid therein complied with before the rights of the landlord are interfered with. The scheme of the section is clear. As soon as a building falls vacant, the landlord is obliged to intimate the fact of the vacancy to the Controller who is a Government officer. Within a week of the receipt of the notice from the landlord, if the building is required for any of the purposes mentioned in sub-section (2), the Government or the officer empowered by them should intimate to the landlord that the building is so required. If the purpose for which the building is required does not exist any longer, there is nothing to prevent the Government vacating the building and again when the landlord intimates the fact of the vacancy to the Controller requiring the building for any other purpose if the Government so require it.

We have refrained from expressing any opinion as to the validity of the several acts of the Provincial Government and their officers in this case, because of the view that we have expressed, namely, that the act or order of the Collector dated the 1st October, 1947 cannot be quashed by a writ of *certiorari*.

The application is therefore dismissed ; but in the circumstances, we do not propose to make any order as to costs.

K.S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Yangalasetti Thirupathaiah .. *Petitioner**

v.

Kopalle Mangapathi Rao and others .. *Respondents.*

Court-Fees Act (*VII of* 1870), *section* 7 (iv) (c) *and* 9—*Declarations and injunction—Site belonging to temple—Suit regarding—Site whether has got market value—Appointment of commissioner—Power of Court—Costs—Who is to bear.*

The suit was filed for a declaration that the suit plot of land was trust property, that its alienation by the second defendant in favour of the first defendant was void and for a consequent injunction restraining the defendants from interfering with the rightful possession of the plaintiff.

Held, that court-fee was payable as for two separate declarations, one as regards the nature of the property and the other as regards the validity of the alienation and also on the consequential relief by way of injunction.

Held also, that the site forming the subject-matter of the suit had a market value.

The court has power under section 9 of the Court-Fees Act to appoint a commissioner and if the appointment is warranted by the provisions of the section, the plaintiff would have to pay his costs though he may not have been appointed at the instance of either party.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Guntur, dated 26th November, 1945 in C.F.R. No. 6254 of 1945, in unregistered appeal No. of 1945 (preferred against the decree of the District Munsiff Court, Guntur, in O.S. No. 571 of 1944).

V. Suryanarayana for Petitioner.

The Government pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the first defendant in O.S. No. 571 of 1944, on the file of the District Munsiff's Court, Guntur, the suit being one for a declaration that the suit plot of land was trust property, that its alienation by the second

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*C.R.P. No. 126 of 1946. 5th December, 1947.

defendant in favour of the first defendant was void and for a consequent injunction restraining the defendants from interfering with the rightful possession of the plaintiff. The suit was decreed. In appeal by the petitioner (the first defendant), the learned District Judge found that the proper Court-fee to be paid would be for two separate declarations with one consequential relief by way of injunction. He was also dissatisfied with the value placed upon the site and directed the appointment of a commissioner at the petitioner's expense to ascertain the value.

I have no doubt that the learned District Judge was right in holding that two independent declarations were asked for and that separate fees will have to be paid; for it would not directly follow that because the property was trust property, it could not be alienated. Trust properties are sometimes lawfully alienated.

It is argued that the suit property has no market value. For this contention, support is sought in *Rajagopala Naidu* v. *Ramasubramania Aiyar*[1], in which a Full Bench of this Court held that a temple had no market value. It was contended that it had some value based on its materials; but the learned Judges held that there could be no market for a temple as such and that therefore it had no market value. That argument would not however apply to the suit site, which certainly has a market value. As the learned Government Pleader pointed out, agricultural land belonging to a temple may be trust property and ordinarily inalienable, and yet may have great market value.

The learned District Judge has certainly power under section 9 of the Court-Fees Act to appoint a commissioner; but a difficulty arises, because the commissioner was not appointed at the instance of any party; and so it is rather difficult to know who in equity would have to pay the costs of the commissioner, at any rate in the event of its being found that the market value is as stated by the plaintiff. If, however, the appointment of a commissioner is warranted under section 9, he must be paid, and the only person who can pay him is the plaintiff himself. The learned District Judge should, of course, have regard to the limited value of the property. In appointing a commissioner, he will doubtless see that unnecessary expense is not incurred; *e.g.*, an amin or some person who is not likely to demand a high fee may be appointed as commissioner.

The petition is dismissed with costs.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Sahul Hameed Rowther .. *Petitioner**

v.

K. C. P. Mohideen Pichai .. *Respondent.*

Court-Fees Act (VII of 1870), section 7 (iv-A) (Mad).—Plaintiff alleging that sale deed executed by him in favour of defendant was sham and nominal and praying for declaration to that effect and for injunction restraining defendant from interfering with plaintiff's possession—Prayer for cancellation of deed and court-fee for it—If necessary—Valuation for Court-fee and jurisdiction.

Where a plaintiff alleged that a sale deed executed by him in favour of the defendant was sham and nominal and prays for a declaration to that effect and an injunction restraining the defendant from interfering with the plaintiff's possession it is not necessary for the plaintiff to pray for cancellation of the deed and to value his suit for purposes of court-fee and jurisdiction under section 7 (*iv-A*) of the Court-Fees Act. There can be no objection to the plaintiff's drawing the attention of the Court to the fact that in deciding whether the plaintiff was entitled to an injunction or possession, it would first have to decide whether the document in question was sham and nominal. It cannot be said

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1. (1923) 45 M.L.J. 274 : I.L.R. 46 Mad. 782 (F.B.).

*C.R.P. No. 775 of 1946. 11th December, 1947.

that the plaintiff should pay additional court-fee for cancellation merely because he mentions the sham document in his plaint.

Case-law discussed.

Krishnaswami v. *Kuppammal*, A.I.R. 1929 Mad. 478 relied on.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Judge, Madura dated 17th April, 1946 in C.M.A. No. 5 of 1946 in O.S. No. 176 of 1945, District Munsiff Court, Melur.

Messrs. S. Srinivasaraghavan and S. Ramachandra Ayyar for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—The respondent, alleging that a sale deed executed by him in favour of the petitioner was sham and nominal, prayed for a declaration to that effect and for an injunction restraining the defendant (petitioner) from interfering with his possession; in the alternative, in case the Court should find that his possession had been disturbed, he prayed for possession. He paid Court-fee under section 7 (*v*) (*b*), at ten times the kist, which was higher than the Court-fee payable on the alternative relief for declaration and injunction under section 7 (*iv*) (*c*). The District Munsiff before whom the suit was filed held that the suit should have been valued and Court-fee paid according to section 7 (*iv-A*), since by implication the plaintiff was asking for cancellation of the sale deed. He found that the value of the suit according to section 7 (*iv-A*) was Rs. 6000, which was beyond his jurisdiction. So he returned the plaint for presentation to the proper Court. The plaintiff took the matter in appeal to the District Judge, who reversed the order of the District Munsiff and found that the suit was properly valued and that the proper Court-fee had been paid. He therefore directed the District Munsiff to again take the plaint on file and dispose of the suit according to law.

The short point that arises in this Civil revision petition filed by the defendant is whether in view of the plaintiff's allegation that the sale was sham and nominal, it was necessary for the plaintiff to pray for cancellation of the deed and to value his suit for purposes of jurisdiction and Court-fee under section 7 (*iv-A*).

We have been referred to many cases, of which *Swaminatha Iyer* v. *Rukmani Ammal*[1], and *Petherperumal Chetti* v. *Muniandi Servai*[2], may be cited as examples, in which it has been held that when a transaction is sham and nominal there is no need to have the transaction formally set aside, and that it can be ignored.

In most of the cases cited to us subsequent to *Vellayya Konar* v. *Ramaswami Konar*[3] the test laid down by Wadsworth, J., has been applied. He said,

"When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto*."

So the learned Judges have asked themselves in the various cases which have been cited before us whether there was any insuperable obstruction to granting the relief prayed for. If there existed a document which amounted to an insuperable obstruction, then it was necessary to have the obstruction set aside by praying for its cancellation. In *Thirumalayandi Thevar* v. *Uthandu Thevar*[4], and *Ramanathan Chettiar* v. *Ramanathan Chettiar*[5], it was presumed that the document which purported to transfer property from one person to another was an insuperable obstacle to the granting of a decree for injunction or possession in favour of the person who under that deed purported to convey the property to another; but is such a deed, when it is said to be sham and nominal and is worth

1. A.I.R. 1920 Mad. 88 (1).
2. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (P.C.).
3. (1939) 2 M.L.J. 400 : I.L.R. 1940 Mad. 73.
4. (1947) 1 M.L.J. 212.
5. (1946) 2 M.L.J. 114.

nothing more than the paper on which it is written, an insuperable obstacle to the granting of any relief to the person who under that document purports to convey the property to another? In all the cases to which we have been referred and in which this question has arisen it has been uniformly held, as pointed above, that it is not necessary to set aside a transaction which does not effect any transfer of title at all. If so, then the transaction and the document evidencing it are not insuperable obstacles to the granting of the plaintiff's prayer. If the Court finds that title did pass by the document, then a suit merely praying for a declaration that the transaction was sham and nominal will have to be dismissed, even though the Court might be of opinion that the plaintiff had a right to have the deed cancelled.

So far there is no dispute. The learned advocate for the petitioner concedes that if the plaintiff had ignored the deed in his plaint and had merely asked for an injunction or possession as the case might be, then the defendant would have no argument to oppose the decision of the lower appellate Court that Court-fee was properly paid under section 7 (iv) (*c*). If the plaintiff had not referred at all in his plaint to this sham and nominal transaction, the Court could not have hesitated for a moment in accepting his valuation of the suit, and if it found when evidence was let in about this transaction that it was sham and nominal, the plaintiff would have been entitled to a decree for injunction or possession. It is however argued that the plaintiff has not ignored the transaction and that he has specifically asked for a declaration that this transaction is sham and nominal and that he must therefore pay Court-fee for this relief. If this argument is correct, then the prayer for a declaration is superfluous, and there is no reason why the petitioner should pay Court-fee for it. We can see no objection to the plaintiff's drawing the attention of the Court to the fact that in deciding whether the plaintiff is entitled to an injunction or possession, it would first have to decide whether the document in question was sham and nominal. We think it desirable that the plaintiff should make mention of such a document in his plaint; but we do not think, because he in this way assists the Court in the framing of the proper issues, that he should be called upon to pay some additional Court-fee.

It has been said that no case has gone so far as to say that section 7 (*iv-A*) would not apply where there was a prayer for a declaration that the sale was sham and nominal, but we find that in *Krishnaswami* v. *Kuppu Ammal*[1], there was a prayer for a declaration of the plaintiff's title to the property. This seems to us the same thing as asking for a declaration that the sale deed was sham and nominal. If it was sham and nominal, then he had title. If it was not sham and nominal, then he had no title. So it seems to us that *Krishnaswami* v. *Kuppu Ammal*[1] is an authority for the position which we regard as the right one. We hold that the lower appellate Court was right in holding that the Court-fee paid was sufficient.

The petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

R. Ramaswami Chettiar .. *Appellant**

v.

Sriperumbudur M. Ramaswami Pillai .. *Respondent.*

Madras City Tenants Protection Act (III of 1922), sections 1 (3) and 2 (4)—Tenant holding over after expiry of term of lease—Expiry after the Act came into force—Tenant entitled to privileges of the Act.

The defendant and another entered into possession of the suit land in 1921 under a registered lease for 10 years. After the expiry of the lease in 1931, the defendant alone continued in possession. In 1944 the defendant executed an unregistered rental agreement in favour of the plaintiff who purchased the suit land from the original lessor's son. In a suit by the plaintiff to eject the defendant,

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1 A.I.R. 1929 Mad. 478.

* C.C.C.A. No. 55 of 1946. 10th December, 1947

Held, (i) Under the clear wording of the sub-section (4) of section 2 of the Madras City Tenants Protection Act, the defendant is a tenant within the meaning of the Act entitled to the privileges conferred by the Act (ii) The rental agreement has no legal effect as it was unregistered and not signed by the lessor. That being so, the possession of the defendant is referable only to his holding over after the termination of the lease and not to the execution of the subsequent rental agreement.

Raganadham v. *Ethirajulu*, (1940) 1 M.L.J. 24 : L.R. 67 I.A. 25 : I.L.R. (1940) Mad. 172 (P.C.) and *Nayar Varada Pillai* v. *Ghulam Dastagir*, (1945) 2 M.L.J. 190 referred to.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 436 of 1945 dated 7th January, 1946.

S. Amudachari for Appellant.

M. K. Harihara Aiyer for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal against the decree of the Principal Judge, City Civil Court, dismissing the appellant's suit for ejectment of his tenant (the respondent) and for mesne profits.

The respondent and another entered into possession of the suit land on the 14th July, 1921, by Ex. D-1, which was a registered lease for a term of ten years, agreeing to pay Rs. 12 per month for the first five years and Rs. 15 per month for the second period of five years. According to the evidence of the respondent, which has not been refuted, the respondent alone continued in possession after the expiry of the lease in 1931. The other lessee is said to have died in 1936, whereupon his relatives took away his cows and took no further interest in the sheds which had been erected on the suit land after the execution of the lease in 1921. On the 15th July, 1944, after the suit land had been sold to the plaintiff by Balasundara Achari, son of Gangadhara Achari (the lessor under Ex. D-1) the defendant executed a rental agreement, Ex. P-1, in favour of the plaintiff. The question is whether on these facts the respondent is a tenant within the meaning of the Madras City Tenants Protection Act and is entitled to the benefit of those provisions. If he is, then the suit was rightly dismissed : if he was not then the plaintiff is entitled to succeed in his suit for ejectment.

In section 1, sub-clause 3, the Act is said to apply to tenancies of land created before the commencement of the Act. The only tenancy prior to the Act with which we are concerned is Ex. D-1, dated the 14th July, 1921, which expired after the coming into force of the Act. Under section 2 (4) "tenant" is defined as "tenant of land liable to pay rent on it . . . . . and includes persons who continue in possession after the termination of the tenancy." The respondent was liable to pay rent on the land from 1921 onwards and he continued in possession after the termination of the tenancy. So, under the clear wording of this sub-section, he is a tenant within the meaning of the Act entitled to the privileges conferred by the Act.

It is argued that after the termination of the lease a new tenancy was created, not only because one of the joint tenants ceased to be a tenant, but also because the respondent continued to hold over afterwards, and that therefore his rights under the new tenancy were not created before the commencement of the Act. With regard to the second point, it is true that the original tenancy came to an end in 1931 ; and it may be that the respondent continued under a new tenancy. That does not mean that he is not a tenant within the meaning of the Act, entitled to the benefits of the Act ; because the very definition of a tenant, as already pointed out, includes a person holding over after the termination of the tenancy.

When there are joint tenants and only one of them holds over, the tenant holding over is liable to pay the whole of the rent, to the landlord, who is not entitled to claim from the tenants who do not hold over, any portion of the rent : nor is the landlord entitled to look to any person other than the tenant holding over for the rent. So that after 1931 the appellant was entitled to claim the rent from the respondent ; and the respondent alone was entitled to remain in possession and

pay the rent. The other tenant and his heirs had no rights at all after 1931, when the tenancy came to an end; for they did not hold over.

There remains for consideration the effect of Ex. P-1. If Ex. P-1 had been registered and had been executed by the lessor as well as the lessee, it might have been arguable that after 15th July, 1944, the respondent was no longer a tenant within the meaning of the Act. In that connection, the learned advocate for the appellant has referred us to *Ranganatham* v. *Ethirajulu*[1], in which a lease was created in very different terms sometime after the expiry of the original lease, which was created before the commencement of the Act. Their Lordships held that section 2 (4) applied only to persons holding under the original tenancy or holding over after the tenancy had come to an end and did not include persons in possession under a new lease. A case somewhat similar to the present case came before King, J., in *Nayar Varada Pillai* v. *Ghulam Dastagir*[2], in which the learned Judge distinguished the case before him from that before their Lordships in *Ranganadham* v. *Ethirajulu*[1] on the ground that in the leases that he was considering, the terms were substantially the same. It is not necessary for us to consider how far this distinction drawn by King, J., was valid, because Ex. P-1 had no legal effect, as it was unregistered and was not signed by the lessor. That being so, the possession of the respondent is referable only to his holding over after the termination of Ex. D-1, and not to the execution of Ex. P-1.

The appeal fails and is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

Kunhilakshmi Ammal and others .. *Appellants**

v.

Kizhakke Palat Krishna Menon and others .. *Respondents.*

Malabar Law—Tarwad—Suit for partition—Severance in status—Date of filing written statements—Person conceived earlier and born later to that date—Right to share—Specific act of misappropriation by Karnavan—General account.

The 65th defendant who belonged to the tavazhi of defendants 46 to 55 was born during the pendency of the suit for partition in a Malabar tarwad. It was admitted however, that the date of her conception was subsequent to the date of the plaint but prior to the date on which the written statements of the several defendants were filed in which they expressed their desire for severance of status.

Held, that the date of the severance in status of the defendants was the date when they filed their written statements and that the 65th defendant who was conceived earlier was entitled to a share in the tarwad property.

The Karnavan of a Malabar tarwad can be made accountable for a specific act of misappropriation in respect of a particular amount and the suit will not in such a case be treated as one for the taking of a general account.

Appeal against the decree of the Court of the Subordinate Judge, Ottapalam, dated 29th August, 1944 in O.S. No. 28 of 1942 and No. 37 of 1943.

The Advocate-General (*K. Rajah Aiyar*) and *T. C. Raghavan* for Appellants.

K. Kuttikrishna Menon, C. Vasudeva Mannadiar, C. S. Venkatachariar, D. Ramaswami Aiyangar, M. V. Ramaswami Naidu and *T. A. Ananta Aiyar* for Respondents.

The Judgment of the Court was delivered by

Happell, J.—This appeal arises out of two suits for partition of a Malabar tarwad which were brought respectively by the karnavan of the tarwad and the senior anandravan.

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1. (1940) 1 M.L.J. 24 : L.R. 67 I.A. 25 : I.L.R. (1940) Mad. 172 (P.C.).
2. (1945) 2 M.L.J. 190.

*Appeal No. 112 of 1945. 19th December, 1947.

The appellants were the 46th to 55th and the 65th defendants in O.S. No. 28 of 1942 and defendants 19 to 28 and the 65th defendant in O.S. No. 37 of 1943.

The question to be decided can be shortly stated. The 65th defendant, who belongs to the tavazhi of defendants 46 to 55, was born during the pendency of the suit. It is admitted, however, that the date of her conception was subsequent to the date of the plaint but prior to the date on which the written statements of the several defendants were filed in which they expressed their desire for severance of status. If, therefore, the severance of status of defendants 46 to 55 dates from the date of the plaint, the 65th defendant who was not conceived by that date, would not be entitled to a share. On the other hand, if the dates of severance are the dates on which the written statements were filed she will be entitled to a share. The learned Subordinate Judge held that the date of the severance of status among the several defendants was the date of plaint. He quoted no authority in support of his finding and the reason given by him for choosing the date of plaint rather than the date on which the expression of the desire for severance was made by the several defendants was merely a convenience. He thought that it would lead to much inconvenience if the several defendants had to be regarded as having severed their status on different dates. In our opinion mere convenience cannot be accepted as the test. The plaint is taken as the date on which a plaintiff who seeks partition severs his status because on the date when he files the plaint he expresses his unequivocal intention of severing his status. In a suit for partition however unless it is by the father of a Hindu joint family, the mere expression of his intention to sever his status by the plaintiff in his plaint does not carry with it the severance of the other members of the family. If they have not previously expressed a desire for severance of status their status will not be severed unless by their written statements they, in their turn, express their desire for severance. It follows from this that the date on which they severed their status must be date on which they expressed their unequivocal intention of doing so, that is, the date on which they filed their written statements. We have not been referred to any reported decision on this question but the view we have expressed was taken by Somayya, J., in his judgment in S.A. No. 275 of 1939, which has not been reported. In our opinion, therefore, the 65th defendant was conceived before the defendants became divided *inter se*. She was, consequently, entitled to her share and the decree of the lower Court will be modified so as to give her a 1/66th share. The appeal is allowed.

A memorandum of cross-objections has been filed by the karnavan who was the plaintiff in O.S. No. 28 of 1942 and the first defendant in O.S. No. 37 of 1943. The objection is to an amendment allowed by the learned Subordinate Judge to the plaint and to an order made by him which was consequential on the amendment. In O.S. No. 37 of 1943, the suit in which the karnavan was the first defendant, the plaintiff had prayed for partition and a direction to the first defendant, the karnavan, to account. A question was raised in respect of the prayer for an account in regard to the proper Court-fee payable; and the plaintiff in that suit then prayed for an amendment by which the prayer for a general account should be deleted and there should be substituted for it a prayer for the recovery from the first defendant of a sum of Rs. 10,000 which it was alleged, he had collected from the tarwad but had kept with him. The learned Subordinate Judge did not try the issue which arose out of this claim to a specific sum of Rs. 10,000 but instead, apparently with the consent of all the parties, gave a direction for the sale of the sum of Rs. 10,000 as a disputed item, leaving it to the purchaser to file a suit against the first defendant if he was so advised. The disputed item was purchased by the plaintiff in O.S. No. 37 of 1943 for a sum of Rs. 755, and he has brought a suit for recovery of the whole sum of Rs. 10,000 from the first defendant. We are of opinion that the Subordinate Judge should not have adopted the course of selling the disputed item. But as it has been sold and a suit on which Court-fee has been paid has been filed in pursuance of the sale as directed by the Subordinate Judge, we are not disposed to set aside the direction which he has made merely on the

ground that he would have done better to have tried the question whether the plaintiff was entitled to recover this sum of Rs. 10,000 from the first defendant in the partition suit itself. It is argued, however, for the first defendant, that the amendment itself should not have been allowed as it introduced a new cause of action and that in any case the directions given by the learned Subordinate Judge amount in fact merely to a direction that the first defendant is liable to account whereas an account cannot be called for from the karnavan of a tarwad. In our opinion the substitution of the prayer for the recovery of a specific sum of Rs. 10,000 for the general prayer for an account introduces no new cause of action. It is a prayer which arises naturally out of a suit for partition. Nor do we think that there is any substance in the criticism that the new prayer is merely the old prayer for a general account in a different form. The karnavan of a tawad can be made accountable for a specific act of misappropriation and what is claimed by the amended prayer is that he has kept in his hand a sum of Rs. 10,000 which should have been utilised for tarwad purposes. We agree, however, that the learned Subordinate Judge has made some observations in the course of his judgment which might indicate that the scope of the suit arising out of the purchase of the disputed item may be wider than the mere recovery of a specific sum of Rs. 10,000 from the first defendant. We would make it clear, therefore, that the suit can only relate to the recovery of the specific sum of Rs. 10,000. It is stated for the plaintiff that a list has been filed in the lower court in the suit regarding the disputed item showing the details of the alleged misappropriation. If, however, in fact, the details in respect of the alleged misappropriation have not been given we direct that they should be given before the trial of the suit is begun.

The appeal is therefore allowed. The appellants will get their costs from the estate. As regards the memorandum of cross-objections the parties will pay their own costs.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Sha Devichand Moolchand .. *Petitioner**

v.

Sha Dhanraj Kantilal .. *Respondent.*

Madras Buildings (Lease and Rent) Control Act (XV of 1946)—*Application for eviction—Death of applicant before hearing—Application by his legal representative praying that he may be brought on record and the respondent evicted—Maintainability—Provisions of the Code of Civil Procedure not applicable to proceedings under the Act —Writ of* certiorari—*Notice to inferior tribunal necessary.*

A landlord who filed a petition before the House Rent Controller for the eviction of his tenant on the grounds that he *bona fide* wanted the premises for his own use and that the tenant committed default in paying the rent died before the application could be heard. His son filed an affidavit repeating the material allegations and praying that he may be brought on record as the legal representative of the petitioner and that the tenant may be evicted. The Rent Controller ordered eviction, but on appeal, the Chief Judge of the Court of Small Causes held, that when the father of the petitioner died, the only course open to the latter as the legal representative was to file a separate application before the Rent Controller and that the original application could not be proceeded with. In an application for the issue of a writ *of certiorari* to quash that order,

Held : the provisions of the Code of Civil Procedure do not apply to proceedings under the Rent Control Act Though the question whether it would be competent for the legal representative to be brought on record as such in an application before the Rent Controller in every case need not be decided, in the circumstances of the case, as the affidavit of the petitioner contains all the material particulars required to be mentioned in an application praying for eviction it would be the height of technicality to disregard it and insist upon a formal petition for the same purpose.

It is absolutely necessary that the tribunal to quash whose order the application for the issue of a writ is taken should be a party, because without notice issuing to the tribunal, the record of the

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*Civil Miscellaneous Petition No. 6374 of 1947. 19th January, 1948.

proceedings cannot be brought up to the High Court. Whether the officer or authority concerned should also be required to appear is a matter which may depend on the circumstances of each particular case.

The desirability of framing rules making at least some of the important provisions of the Code applicable to proceedings under the Madras Building Lease and Rent Control Act pointed out.

The attention of the Rule Committee is drawn to the urgent necessity for making rules prescribing the forms for issue of a rule *nisi*, return, as well as rule absolute.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings in H.R.A. No. 446 of 1947 before the Chief Judge of the Court of Small Causes, Madras, from L. Dis. No. 7277 H.R.C. of 1946 before the Rent Controller, Madras, relating to House No. 201, Govindappa Naicken Street George Town, Madras, and to quash the said appellate proceedings therein and restore the order of the Rent Controller dated 11th April, 1947.

K. S. Champakesa Iyengar and *K. C. Srinivasan* for Petitioner.

M. S. Venkatarama Ayyar and *S. Rangaswami Ayyangar* for Respondent.

The Advocate-General (*K. Rajah Aiyar*) and *K. Veeraswami* instructed by the Government Solicitor, Madras, for the Chief Judge of Court of Small Causes.

The Order of the Court was pronounced by

The Officiating Chief Justice.—This is an application to issue a writ of *certiorari* to quash the order of the learned Chief Judge of the Court of Small Causes, Madras, made by him in H.R.A. No. 446 of 1947 from the order of the House Rent Controller in H.R.C. No. 7277 of 1946.

The petitioner before us is the son of one Sha Moolchand Jodhajee who owned premises No. 201, Govindappa Naicken Street, G.T., Madras, in which the respondent was carrying on business as a tenant. On the 12th December, 1946, Jodhajee filed a petition before the Rent Control Officer, Madras, under section 7 (2) (1) of Madras Act XV of 1946, seeking to evict the respondent from the premises. The ground alleged by him was that the respondent had failed to pay the monthly rental of Rs. 225 for the month of October on or before the last day of the month next following, that is to say, on or before the 30th November, 1946. He alleged that the rent for the months of October and November, 1946, was sent to him only on the 5th December, 1946 and received by him on the 9th December and was refused and was returned by him. He also alleged that he was himself carrying on business in a rented building, No. 88, Nyniappa Naicken Street, Madras, and that he required the premises in question *bona fide* for his own business. It is common ground that this latter circumstance by itself would not have justified the landlord in seeking to evict the tenant. On the 6th January, 1947, the respondent filed a counter-statement in which the main defence urged was that the landlord had demanded in the middle of October, 1946, an enhanced rent of Rs. 337-8-0 with effect from the 1st October, 1946 and there was a discussion between the parties on the subject of the demand for an enhanced rent and that in the beginning of November the respondent tendered to the petitioner the rent of Rs. 225 but the landlord refused to take it. It was further stated that when the landlord's bill-collector came towards the last week of November for collection of rent at the enhanced rate, the respondent tendered to him the rent for October and November at Rs. 225 per month but the bill-collector refused to receive the amount. Reference was made to arbitration and on the intercession of one Javerchand Kasaji an agreement was reached between the parties by which Rs. 280-8-0 was fixed as the rent payable. The respondent alleged that in spite of this agreement when a cheque was sent by him at the rate of Rs. 280-8-0 for the months of October and November on the 5th December, 1946, the cheque was refused and returned.

On the 22nd January, 1947, before the application came on for hearing Jodhajee, the father of the petitioner, died. The present petitioner thereupon filed an affidavit before the Rent Controller on the 18th February, 1947, stating

that his father had died and that he was his only son and legal representative entitled to be brought on record. He reiterated the material allegations in the original petition filed by his father, namely, that the respondent had committed wilful default in payment of rent for October, 1946 and that he was liable to be evicted and that he (the petitioner) was carrying on business in a rented building and was put to considerable trouble and he required the premises for his own business. The concluding paragraph in the affidavit is as follows :—" I pray I may be brought on record as the legal representative of the petitioner herein and the respondent may be evicted." The respondent filed a short counter-statement urging that the petition was not maintainable as there was no provision in the Act to bring on record legal representatives to continue the proceedings instituted already and the petitioner's only remedy was to file a fresh petition. He pleaded that the statement filed by him already may be read as part of his second statement.

The Rent Controller by his order, dated the 11th April, 1947, directed the respondent to put the petitioner in possession of the premises on the ground that the rent for the month of October was not paid or tendered on or before the 30th November, 1946. He refused to believe the case of the respondent that there was a tender in November. The Rent Controller assumed that the present petitioner could be brought on record as the legal representative and in effect he treated him as the petitioner in the case. There was an appeal by the respondent to the learned Chief Judge of the Court of Small Causes. The learned Judge held that when the father of the petitioner died, the only course open to the petitioner as his legal representative was to file a separate application before the Rent Controller on the same ground and the application was incompetent after the death of the original petitioner, by which apparently he meant that the application could not be proceeded with. On this finding the appeal was allowed ; but as he was invited to give a finding on the merits, he briefly dealt with them. He was of the opinion that the landlord, having demanded enhanced rent for the property, could not complain if the tenant did not tender the original rent. He did not go into the question whether any tender was made in November as pleaded by the respondent. This application is to quash the order of the learned Chief Judge.

The learned advocate for the petitioner contended that though there was no provision either in the Act or in the rules made thereunder incorporating or making applicable any of the provisions of the Code of Civil Procedure, nevertheless the principle of those rules would apply because the Rent Controller must be deemed to be a Court of civil jurisdiction within the meaning of section 141 of the Code as the Rent Controller was invested with powers to adjudicate upon civil rights of parties. We are not inclined to agree with this contention. It is sufficient to refer on this point to the observations of Sir Frederick Gentle, C.J. and Govindarajachari, J., in the recent case of *Abdul Khadir Hadjiar* v. *A. K. Murthy*[1]. The learned Chief Justice observed as follows :—

> " It is, in my view, to be regretted that the provisions of the Code have not been made applicable to proceedings under the Control Act, and that, when the Provincial Government, exercising the power conferred by section 17 of the Act, made rules of procedure, they did not in those rules do what would have been, I think, desirable ; they did not enable the provisions of the Code, so far as applicable and relevant to be made use of in proceedings under the Control Act. In the absence of rules, it was argued, nevertheless the principles of them must be applied. I am unable to accept that contention."

At another place he says :

> " I have already expressed the view that in the absence of incorporation of the provisions of the Code of Civil Procedure in the rules of procedure for the tribunals under the Control Act, there is no justification for the application of the principles of those provisions, otherwise it would mean applying those provisions when they are not made applicable."

We respectfully agree with these observations. We likewise express regret that the rules do not provide for the application of at least some of the important rules of procedure contained in the Code of Civil Procedure to proceedings under the Rent Control Act.

1. (1947) 2 M.L.J. 482.

But in this case we are not much impressed with the technical objection taken that a separate application should have been filed by the petitioner instead of an application to be brought on record to continue the petition filed by his father. The affidavit of the petitioner dated the 18th February, 1947, to which reference has already been made contains all the material particulars required to be mentioned in an application praying for eviction and it appears to be the height of technicality to disregard this fact and insist upon a formal petition for the same purpose. The question whether it would be competent for the legal representative to be brought on record as such in an application before the Rent Controller in every case need not be decided by us. We desire however to point out that it appears to be necessary for a rule to be made providing in appropriate cases for the bringing on record of legal representatives on the death of the original applicant.

We therefore hold that the order of the learned Chief Judge of the Court of Small Causes, dismissing the application of the petitioner on the ground that it was incompetent and not maintainable is wrong and must be quashed. The result would be that the appeal must be heard afresh.

It may be pointed out that the learned Judge failed to record any finding on the important plea of the respondent contained in paragraph 5 of his original counter-statement, namely, that there was a proper tender before the due date on two occasions. It would be necessary for the learned Judge to go into this question before he comes to a final decision on the matter.

The learned Advocate-General, who appeared for the Chief Judge of the Court of Small Causes to whom notice was directed to issue by order of this Court, drew our attention to the fact that there are no forms prescribed for the issue of rule *nisi* and for other notices in proceedings for the issue of a writ of *certiorari* and that in many cases the tribunal, whether it be a Judge of a Court or Board of Commissioners or an officer of the Government is not made a party to an application for the issue of a writ of *certiorari*. We are of the opinion that it is absolutely necessary that the tribunal to quash whose order the application for the issue of a writ is taken should be a party because without notice issuing to such tribunal, the records of the proceedings cannot be brought up to this Court. The writ of *certiorari* is the process by which the King's Bench Division in Britain, in the exercise of the superintending power over inferior jurisdictions, requires the judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below. (*See* Short and Mellor's Crown Practice, page 14). That being so, a writ of *certiorari* must issue to the inferior Court. Whether the officer or authority concerned should also be required to appear in person or by pleader is a matter which may depend on the circumstances of each particular case. We consider this matter should receive the attention of the Rule Committee at an early date so that rules may be made prescribing the forms for the issue of rule *nisi*, return, as well as rule absolute.

In the result the rule will be made absolute. The respondent will pay the costs of this application to the petitioner.

V.P.S. *Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Nakka Appala Naidu .. *Petitioner**

v.

Nakka Latchu Naidu and others .. *Respondents.*

Jurisdiction of Courts—Inferior Court directed to take security by High Court—Inferior Court acting under the direction, if an agent or commissioner appointed under Order XXVI of the Civil Procedure Code—Not a persona designata—*Remedy of party aggrieved by the order of such inferior Court.*

The High Court, pending the disposal of a second appeal, passed the following order in a Civil Miscellaneous Petition "Interim stay of passing final decree is made absolute on condition that the petitioner furnishes security to the satisfaction of the trial Court for the sum of Rs. 1,200 towards mesne profits within 8 weeks." In pursuance of this order the appellant in the second appeal offered certain properties as security. Though the respondent objected to the sufficiency of the security offered, the trial Court accepted the security as sufficient and satisfactory. Thereupon, the respondent in the second appeal moved the High Court by a Civil Miscellaneous Petition to direct the appellant to furnish additional security in order that the above order of the High Court may be properly complied with. On a question as to maintainability of such an application,

Held, the proper remedy of the petitioner was to apply to the trial Court to review its order if there were sufficient grounds for that or to move the High Court to revise the order of the lower Court under section 115 of the Civil Procedure Code, if there were sufficient reasons justifying the same. When a Superior Court directs an inferior Court to take security the Subordinate Court acts not as *persona designata,* but as a Court subject to the revisional or appellate jurisdiction of the Court which orders the same. The order in this case imposed the duty of testing and accepting or rejecting the security upon the 'trial Court' and not upon any particular officer. It was not directed to a particular District Munsiff by name to clothe him with the status of an agent or commissioner so that he alone can perform the functions of testing the security. The above order of the High Court was a final one and cannot be re-opened in the present application.

English and Indian case-law discussed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the appellant to furnish additional security for a sum of Rs. 1,000 in order to comply with the order of the High Court dated 18th March, 1947, in C.M.P. No. 88 of 1947 in A. S. No. 1809 of 1946 preferred to the High Court against the decree of the Court of the District Judge of Vizagapatam in A.S. No. 117 of 1945 preferred against the decree of the Court of the District Munsiff of Chicacole in O.S. No. 555 of 1942.

C. V. Dikshitulu and *B. Jagannadha Das* for Petitioner.

K. Subba Rao for Respondents.

The Court made the following

ORDER.—The point raised by Mr. Dikshitulu, novel and interesting as it is, and bereft of any direct authority in our Courts, did seem at first blush to be one of substance, but on a careful and critical examination, did not appear to be a difficult one.

On the 18th March, 1947, my learned brother Yahya Ali, J., in C. M. P. No. 88 of 1947 (S. A. No. 1809 of 1946) made the following Order:

"Interim stay of the passing of final decree is made absolute on condition that petitioner furnishes security to the satisfaction of trial Court for the sum of Rs. 1,200 towards mesne profits within eight weeks."

The trial Court was the District Munsiff of Chicacole. In pursuance of this order the petitioner in C. M. P. No. 88 of 1947 offered a half share of the properties involved in the second appeal as security for the said sum of Rs. 1,200. The sufficiency of this was objected to by the opposite party but the learned District Munsiff after ascertaining the value of the property and considering the objections raised as regards sufficiency, found that the share of the party offering security, in the wet lands itself, was worth about Rs. 1,700 and accepted the security as sufficient and satisfactory. Thereupon, the respondent in second appeal who was also the 11th respondent in C. M. P. No. 88 of 1947 feeling aggrieved by the order of the District

* C.M.P. No. 4470 of 1947. 6th January, 1948.

Munsiff accepting the security, has moved this Court by this petition to direct the appellant to furnish additional security for the sum of Rs. 1,000 in order that the order of this Court in C. M. P. No. 88 of 1947 may be properly complied with. In support of this application, an affidavit by the first respondent has been filed and in it, various facts are set forth to show that the District Munsiff was wrong in accepting the security as sufficient, for the reason that the properties tendered as security would not be sufficient for any amount over Rs. 200. The allegations in this affidavit are controverted by a counter filed by the first appellant in the second appeal to which there is a rejoinder in the nature of a reply affidavit affirming and restating the objections raised in the affidavit in support of the application.

In these circumstances the question that has been raised is whether this Court can look into the matter afresh and find out whether the order of the District Munsiff is correct on the facts and on the merits. In short, the contention raised is that as the properties tendered as security were not at all sufficient for the sum of Rs. 1,200 and if the District Munsiff had merely considered the matter, he would have perceived the patent mistake committed by him, from the circumstance that the respondent to this petition is not entitled to a half share in the entire properties but only to a half share in 4 acres 40 cents of dry lands the value of which after deducting the charge for Rs. 500 already created therein would not exceed Rs. 200.

On behalf of the respondents it is contended that this Court has already made a final order on the 18th March, 1947, and that it cannot further re-open the whole question to decide *for itself* whether the security was sufficient or not. It is urged that the petitioner's remedy, if any, is to apply to the lower Court for review of the order if there are materials sufficient to justify the review, or to move this Court to revise the order of the lower Court under section 115 of the Civil Procedure Code in case there are reasons justifying such a revision. Apart from these remedies, the respondent contends there is no power vested in this Court to scrutinise the sufficiency or otherwise of the security in an application like this. Mr. Dhikshitalu for the petitioner argues that when the District Munsiff was asked to take security for the sum of Rs. 1,200 to his satisfaction, he acts as an agent of this Court and it is open to the High Court to affirm, modify or alter his conclusion accepting the security; and therefore until the High Court affirms the correctness of the acceptance of security, there is no finality in the proceedings. The action of the District Munsiff in accepting or refusing to accept the security is only that of an agent subject to the approval of the principal who in this case is the High Court. On the other hand, the respondent contends that the order dated 18th March, 1947, has become final and cannot be modified or altered in these proceedings.

For a proper understanding of the point involved, it is necessary to analyse and ascertain under what jurisdiction the District Munsiff acts when proceedings are taken in pursuance to the order of this Court. It cannot, for a moment, be said, as alleged by the petitioner, that the District Munsiff is an agent or commissioner appointed under Order 26 of the Civil Procedure Code. The Court of the District Munsiff is one subordinate to the High Court in virtue of the provisions of the Madras Civil Courts Act of 1873 and of section 224 of the Government of India Act, 1935 (section 107, Government of India Act, 1915). Mr. Dhikshitalu's contention that the District Munsiff acts only in the capacity of an agent or commissioner who has certain powers delegated to him is to my mind unacceptable. Mr. Dhikshitalu admitted that this argument if pushed to its logical extreme would come to this, that a District Munsiff can refuse to act when ordered by the High Court to examine the security for it is not obligatory upon an agent or commissioner to accept and act if he is not so inclined, under the directions of the principal or a Court. This argument overlooks the superintending powers of the High Court over the Subordinate Courts and a mere statement of Mr. Dhikshitalu's argument is sufficient to show the hollowness of it.

Certain decisions of the English Courts have been brought to my notice in support of his argument by the learned counsel for the petitioner. The first of

them is *Ross* v. *The York Newcastle and Berwick Railway Co.*[1] and reliance is placed on the following observations in the judgment of Erle, J., for justifying the contention of the learned advocate :

> " Where the Court refers taxation to its officer, it has the power of reviewing because the power by the officer is delegated to him by the Court, and his act is not effective unless adopted by the Court."

This sentence, taken from its context, no doubt affords some plausible justification for the argument but if the facts of the case are carefully looked into, I am afraid the case is not authority for the contention put forward. In that case, according to a certain parliamentary enactment it was open to a railway company to issue warrants to the Sheriff to summon a jury to assess the amount of compensation payable for the acquisition of a piece of land from its owner. The jury was summoned and a sum of money was fixed as compensation. There was a further provision in the statute that in case amount offered to the owner prior to the summoning of the jury was not less than the amount which the jury had fixed, it was open to the company to apply to a Master of the Court of Queens Bench in England to assess the amount of costs due to the company. Accordingly, when the Master assessed the amount of costs, the aggrieved party moved the Court of the Queens Bench for a rule for the Master to review his taxation of costs. On this a preliminary objection was taken that in reference to this taxation of the costs, the Master was an original arbitrator and therefore the Court has no power to review the decision of the Master in the matter so referred to him. The learned Judges of the Queens Bench (Erle and Weightman, JJ.) upheld the preliminary objection and held that when the Master was appointed to assess the amount of costs he was only a *persona designata* and the assessment or award was final and not subject to review by the Court of the Queens Bench. In discussing this aspect of the case the learned Judges observed that if the taxation was done by the Master as an officer of the Court, then, such action of his being the result of a delegation of the power from the Court may be subject to review by the Court. I do not think that this case can in any way help the petitioner. The next case on which reliance is placed was *Owen* v. *The London and North Western Railway Co.*[2] Here also the Master of the Court was empowered under section 52 of the Lands Clauses Act of 1845, to assess the amount of costs payable to the successful party. On the application made by the aggrieved party to the Court of Queens Bench Division to review the order of the Master, the learned Judges (Cockburn, C.J., Shee, Lush and Mellor, JJ.) declined to do so on the ground that the Court had no jurisdiction to review the order of the Master. The learned Chief Justice points out that the Master as an officer of the Court was delegated with certain powers of the Court and if he were acting in that capacity the Court has necessarily jurisdiction to control the delegated authority in the event of there being anything which the Court may think wrong in its exercise. But where the Legislature has thought proper to give the power of taxation and impose the duty of the taxation not on the Court, but simply on one of the Masters of the Court, without in any way rendering it necessary that the Court should interfere, it was held that the Court had no authority over the Master as he was acting in his individual capacity. The other learned Judges in separate but concurring judgments, agreed with the learned Chief Justice. These two decisions were followed by the Court of Appeal in In the matter of an arbitration between the *Sandback Charity Trustees* and the *North Staffordshire Railway Co.*[3], where Bramwell, Brett and Cotton, JJ., held that where the costs of an inquiry before the arbitrators under the Lands Clauses Consolidation Act are taxed and settled as between the parties by one of the taxing Masters of the superior Courts of Law under section 1 of 32 and 33 Vict., Chap. 18, the Court has no jurisdiction over the Master's taxation on a motion to review.

These decisions, far from supporting the point raised on behalf of the petitioner run contrary to his contention. The *raison d'etre* of the above decisions is that where

1. 18 L.J. Q.B.N.S. 199.
2. 37 L.J. Q.B. 35.
3. (1877) 3 Q.B.D. 1.

an act of Parliament designates an officer of the Court to do certain functions, the Court has no power to review or modify his proceedings even though as an officer of the Court he is subordinate to the Court itself.

The only Indian case to which my attention was drawn is a decision of S. K. Ghose and Patterson, JJ., in *Bibhabati Debi* v. *Ramendra Narayan Roy*[1]. The facts of that case are that the Calcutta High Court in its appellate jurisdiction directed security to be furnished by a party to the satisfaction of the Registrar of the Original Side of that Court. It was held that the decision of such authority on the sufficiency of the security cannot be questioned by means of an appeal or application because the High Court cannot go behind his finding. It was further held that the High Court however can review its order on proper grounds such as that the authority designated has not acted in accordance with the order or has acted improperly or has not come to any finding on the sufficiency or otherwise of the security. Adverting to a decision of the Kings Bench in *Hoare & Co.* v. *Morshead*[2], the learned Judges observed as follows :

> " In that case under Order XLV, rule 6 an order was made by the Master, granting the defendant leave to defend upon giving security for the amount claimed to the satisfaction of the Master within a certain time and that order was affirmed by the Judge, Then the matter went back to the Master and he decided that the security offered was insufficient. Against that order an appeal was filed. It was contended in support of the appeal that where an order was made that security should be to the satisfaction of the Master, he really acts by virtue of a delegation of the power of a Judge to him and his decision must be subject to review by the Judge himself. This argument did not find favour with the Court. It was contended on the other hand in opposition to the appeal that if the defendant's contention was right there might be series of appeals. This argument found favour with the Court and Mathew, L.J., in the judgment, referred to it as one of the grounds on which he held that the appeal did not lie. It was held also that the Master was not acting in the exercise of his jurisdiction as Master but as *persona designata*."

Reading this decision as a whole it appears to me that the learned Judges were of the view that when security was directed to be taken to the satisfaction of the Registrar on the Original Side, that officer functions not as a Court but as a *persona designata*.

In the case under consideration now, the order was that security should be furnished to the satisfaction of the trial Court and that makes all the difference between the Calcutta case and the present one. It cannot be said that here the District Munsiff was *persona designata* but as the order itself shows, he was functioning as a Court. At page 190, first column of the report, Ghose, J., makes a distinction between cases of an order requiring security to the satisfaction of the lower Court and one directing security to be taken to the satisfaction of the Registrar. Even then, the learned Judge observes that in such cases the intention in making an order is that the lower Court should finally dispose of the matter and that it should not again come up to the High Court. To this extent the observation is applicable to the present case though it was *obiter* in so far as that case was concerned.

When this Court directed security to be taken to the satisfaction of the lower Court it cannot for a moment be doubted that the proceedings before that Court were to be taken as a Court of inferior jurisdiction subject to the liability of superintendence by this Court and as stated already, the District Munsiff in testing the security and accepting it was functioning as a subordinate Court subject to the revisional jurisdiction of this Court. He also had a right to review the matter on suitable grounds as laid down in Order 47 of the Civil Procedure Code. Such being the case, the proper remedy to be followed by the petitioner herein is to apply to the District Munsiff to review his order if there are sufficient grounds for that or to move this Court to revise the order of the lower Court under section 115 of the Civil Procedure Code if there are sufficient reasons justifying such a course. Without adopting either of these alternatives, the petitioner, in directly moving this Court to order the District Munsiff to take further security is pursuing a misconceived remedy, the analogy of the Master of the High Court or the Master attached to Courts in England is not at all apt. In England under the Judicature

1. (1937) 42 C.W.N. 188. 2. (1903) 2 K.B. 359.

Act of 1873 there is only one Supreme Court of Judicature divided into two parts, the High Court of Justice and the Court of Appeal. Both are parts of one and the same Supreme Court. For convenience in transacting business, it is divided into various divisions of which the Chancery Division consists of the Lord Chancellor, the Master of the Rolls with some Judges and the Kings Bench Division consists of the Lord Chief Justice and some other Judges. Except that an appeal from the Kings Bench Division or the Chancery Division goes to the Court of Appeal there is no superintendence by the Court of Appeal over either the Chancery Division or the Kings Bench Division. In fact the Lord Chief Justice who usually sits in the Kings Bench Division is superior in status to an ordinary Lord Justice who sits in the Court of Appeal. The Master of the Rolls who presides over one of the divisions of the Court of Appeal is, in status, inferior to a Lord Chief Justice. The ordinary Law Lords take precedence only subject to the precedence of the Lord Chief Justice. In this country the High Court has powers of superintendence in administrative and other matters over all the subordinate Courts in the Province, and the District Court in turn has got superintendence over the other Courts in the District. In England the Court of Appeal has no administrative control or superintendence over the Kings Bench or Chancery Division or for the matter of that ever over the country Courts. No doubt the Lord Chancellor has administrative control over the Courts. He does not function in such administration as a Judge. Moreover, such interchanges, *e.g.*, of a Law Lord becoming a Master of the Rolls or a Lord Chief Justice or a retired Lord Chancellor becoming a Lord Chief Justice cannot take place in India. Here we have different gradations of Courts the superior one having administrative control over the inferior and therefore when a superior Court directs an inferior Court to take security the subordinate Court acts not as *persona designata* but as a Court subject to the revisional or the appellate jurisdiction of the Court which orders the same. The order of this Court dated the 18th of March, 1947, imposed the duty of testing and accepting or rejecting the security upon the "trial Court" and not upon any particular officer. It was not directed to a particular District Munsiff by name to clothe him with the status of an agent or commissioner so that he alone can perform the functions of testing the security. According to the terms and spirit of the order any officer who presides over the trial Court is competent to test the security and therefore the transfer of an officer who has started the enquiry to some other Court will not prevent his successor from continuing the same. This circumstance is a further indication to show that the District Munsiff is not an agent or a commissioner but only a subordinate Court to whom a certain task has been assigned by the High Court. It seems to me that my learned brother Yahya Ali J.'s order dated the 18th March, 1947, was a final one and it is not open to me to direct further security to be taken when the District Munsiff was satisfied that the security tendered was sufficient.

For the above reasons I am of opinion that this petition must be dismissed. No leave.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

A. M. A. Firm by Managing Partner Murugappa Chettiar in the place of A. M. A. Palaniappa Chettiar .. *Appellant**

v.

Marudachalam Chettiar (died) and others .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 100 and 91—First charge for property tax under section 85 of Madras District Municipalities Act (V of 1920)—If falls under section 100, Transfer of Property Act—Suit to enforce such charge without impleading other mortgagees—Decree and sale thereon—Effect—Right of such

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* S.A. No. 2169 of 1944. 19th December, 1947.

mortgagees (who had purchased the property in their own suit on their mortgage) to redeem—Suit for such redemption—Limitation—Limitation Act (IX of 1908), *Article* 148 *and not* 132 *applicable—Right to accounting against prior purchasers in possession.*

A charge under section 85 of the Madras District Municipalities Act for property tax is one created by operation of law and falls within section 100 of the Transfer of Property Act and the provisions which apply to a simple mortgage shall apply to such a charge. *Folick Chunder Dey Sircar* v. *Foley*, (1887) I.L.R. 15 Cal. 492 and *Suramma* v. *Suryanarayana Jagapathirazu*, (1918) 35 M.L.J. 443 : I.L.R. 42 Mad. 114, explained ; *Venkatalakshmamma* v. *Seetayya*, (1920) 39 M.L.J. 30 : I.L.R 43 Mad. 786 ; *Shidrao Narayanrao* v. *Athni Municipality*, A.I.R. 1943 Bom. 21 and *Nawal Kishore* v. *The Municipal Board, Agra*, I L.R. 1943 All. 453 (F.B), relied on ; *Corporation of Calcutta* v. *Arunchandra Singha*, (1934) I.L.R. 61 Cal. 1047, distinguished.

The Municipality is in the position of a first mortgagee and a sale in pursuance of the charge unlike a sale for arrears of revenue under the Revenue Recovery Act has not the effect of annulling the prior encumbrances and mortgagee purchasers in execution of the decree on the earlier mortgage who had not been impleaded in the suit by the Municipality are not barred from proceeding with a suit to enforce the right of redemption under section 91 of the Transfer of Property Act against the purchasers of the property in the sale in execution of the *charge* decree. Such a suit will be governed by Article 148 of the Limitation Act. As the suit will not be one for the payment of money, Article 132 would have no application. *Lakshmanan Chettiar* v. *Sella Muthu Naicker*, (1924) 47 M.L.J. 602, not followed ; Decision of Wallace and Ananthakrishna Ayyar, JJ., in S.A No. 304 of 1926, followed.

The defendants in such a suit have no preferential right to possession. *Nagendran Chettiar* v. *Lakshmi Ammal*, (1933) 65 M.L.J. 108 : I.L.R. 56 Mad. 846, distinguished. The defendants will be liable to render an account of the profits from the date of their taking possession subject to just deductions. *Natesan Chettiar* v. *Ramalingam Chettiar*, (1937) M.W.N, 700, relied on.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 309 of 1943, preferred against the decree of the Court of the District Munsiff of Tirupur in O. S. No. 891 of 1941.

T. K. Subramania Pillai for Appellant.

N. Sivaramakrishna Aiyar and *S. Thiagaraja Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal is preferred by the plaintiff whose suit was decreed by the District Munsiff, Tirupur, but dismissed on appeal by the District Judge, Coimbatore.

One Sivasubramania Chettiar and four others executed on the 18th April, 1925, a security bond in favour of the defendants 9 to 13 and the father of the plaintiff and the father of defendants 8 and 14. Suit O. S. No. 301 of 1928, Sub-Court, Coimbatore, was filed to enforce the security bond against the suit house and other properties. Defendants 4 to 7 who were not the executants of the security bond contested the claim and the suit as against their ⅓rd share in the suit house was dismissed and a preliminary decree against the ⅔rd share of the executants was passed on 12th November, 1932 (Ex. P-1). While that suit was pending the Tirupur Municipality instituted suit O. S. No. 943 of 1930 in the District Munsiff's Court, Tirupur, for recovery of arrears of property tax due in respect of the suit house for the years 1927-28, 1928-29, and 1929-30 and claimed a first charge on the suit house under section 85 of the Madras District Municipalities Act. To that suit, the persons holding the security (who may be hereafter termed second mortgagees) were not impleaded as parties, though they were interested in the right of redemption. The Municipality obtained a decree and in execution of that decree the suit house was brought to sale and one Kumaraswami Chetty became the purchaser on 23rd August, 1932. The auction purchaser sold the property to defendants 1 and 2 under a sale deed dated 13th June, 1934. In execution of the final decree in O. S. No. 301 of 1928, the plaintiff and defendants 8 to 15 purchased ⅔rd share of the suit house on 15th January, 1936, and obtained symbolical possession on 9th December, 1938.

The present suit was instituted by one of the purchasers in O. S. No. 301 of 1928 for redemption of ⅔rd share of the suit house, for partition and possession of that share and for an account of the mesne profits received by defendants 1 and 2 as well as for future profits, impleading the other purchasers as defendants 8 to 15.

The defendants 1 and 2 are purchasers from Kumaraswamy and are in possession of the suit house. The 3rd defendant is a subsequent mortgagee from defendants 1 and 2 of the suit house and defendants 4 to 7 are the original owners of the ⅓rd share. The plaintiff and defendants 8 to 15 contend that as they were not made parties to the suit by the Municipality which was in the position of a first mortgagee, their right of redemption was not affected and that the purchase by Kumaraswamy was affected by the doctrine of *lis pendens*.

The defence to the action is that the second mortgagees are not necessary parties to the first mortgagee's suit; that the decree in O. S. No. 943 of 1930 is binding on the second mortgagee purchasers; that they are not liable to account for mesne profits and that the defendants are in any event entitled to the value of improvements. They also plead that the right of defendants 4 to 7 in the suit house became extinguished by reason of the sale in pursuance of the decree in O. S. No. 943 of 1930.

The learned District Munsiff held that the second mortgagee purchasers not having been made parties to the suit O. S. No. 943 of 1930 and being necessary parties to that suit, were not barred by the proceedings in that suit, that defendants 4 to 7 were not entitled to the ⅓rd share in the suit house as they were barred by the sale in O. S. No. 943 of 1930, that plaintiff and defendants 8 to 15 were entitled to a ⅔rd share, that the doctrine of *lis pendens* did not apply and that defendants 1 and 2 were entitled to the value of improvements which were left to be determined in the proceedings for passing final decree and that the defendants were liable to render an account of the profits from the date of their taking possession subject to just deductions. In the result he passed a decree in Form No. 7 of Appendix D, Schedule I of Civil Procedure Code.

Against this decree, defendants 1 and 2 preferred an appeal to the District Court and the District Court reversed the decree of the trial Court and dismissed the plaintiff's suit. The learned District Judge held that the charge in favour of the Municipality was not such as would fall under section 100 of the Transfer of Property Act and therefore the rights of the parties were not governed by the law relating to mortgages; that in any event, the plaintiff and defendants 8 to 15 were not entitled to redeem, their only right being to bring a fresh suit for sale on foot of their mortgage in their favour; that the suit for redemption was barred by limitation under Article 132 of the Limitation Act and that the plaintiffs and defendants 8 to 15 acquired no rights under their purchase as the right of the owners of the suit house became vested in Kumaraswamy Chetty in 1932 under a sale prior in point of time. He agreed with the District Munsiff that defendants 4 to 7 were not entitled to claim the ⅓rd share.

Against this decision of the learned District Judge, the plaintiff preferred this second appeal. It is contended on behalf of the appellant (1) that the charge in favour of the Municipality is within the purview of section 100 of the Transfer of Property Act and that therefore the Municipality is in the position of a first mortgagee and the rights *inter se* between the two mortgagees are governed by the law relating to the mortgages, (2) that the proper Article of limitation applicable is Article 148 of the Limitation Act and not Article 132 and (3) that as the second mortgagees were not impleaded to the suit by the first mortgagee, their right to redeem the ⅔rd share of the house is not extinguished. The respondents' learned advocate attempted to support the judgment of the lower Court and urged in addition that in any event as the first mortgagee purchaser purchased the equity of redemption he is entitled to redeem in his turn the second mortgagee purchasers and that the trial Court is wrong in directing his clients to account for the profits.

The first question that arises for consideration is the nature of the charge in favour of the Municipality under section 85 of the District Municipalities Act. Section 100 of the Transfer of Property Act is as follows:

"Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter

person is said to have a charge on the property ; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

The charge in the present case is not created by act of parties and therefore it may be left out of consideration. Is it not a charge created by operation of law? Section 85 of the District Municipalities Act declares that the property tax on buildings and lands shall subject to the prior payment of land revenue, be a first charge on the buildings and lands (omitting moveable property which is not relevant now). The sale in pursuance of the charge unlike the sale for arrears of revenue under the Revenue Recovery Act has not the effect of annulling the prior encumbrances. Under Schedule IV to the Act, a power of distraint and sale of the property of the defaulter for arrears of the tax is conferred upon the Municipality. Under rule 35-A of the said Schedule :

" If any tax due from any person remains unpaid in whole or in part at the end of the period specified in sub-rule (1) of rule 30 and if such person has left British India or cannot be found, the said tax or such part thereof as remains unpaid together with all sums payable in connection therewith shall be *recoverable as if it were an arrear of land revenue.*"

Even this limited power under rule 35-A attracts only the procedure laid down under the Revenue Recovery Act for the realisation of the arrears of revenue, but does not carry with it the substantive provision of law relating to the annulling of encumbrances under the Revenue Recovery Act (section 42 of the Revenue Recovery Act). The effect of section 85 being only to create a first charge on the property, is there any reason to suggest that it is not a charge springing into existence ' by operation of law ' within the meaning of section 100 of the Transfer of Property Act? There does not appear, either in the language of section 100 of the Transfer of Property Act or the provisions of the Madras District Municipalities Act any reason for concluding that it does not. Reliance has, however, been placed by the Court below and by the learned Advocate for the respondents before me, on the line of cases where the charges for rent under the Bengal Tenancy Act and under the Madras Estates Land Act have been held not to fall under section 100 of the Transfer of Property Act. The starting point for this view is the well-known case of the *Fotick Chunder Dey Sircar* v. *Foley*[1], a decision under the Bengal Tenancy Act, 1885. The landlord in that case obtained a decree for arrears of rent and wished to execute the decree by attachment and sale of the moveable property of the tenant without first proceeding against the tenure on which the rent was a first charge. The contention on behalf of the tenant was, that section 100 of the Transfer of Property Act as it then stood applied to a charge for rent and that the provisions of section 68 of the Transfer of Property Act were attracted and that the landlord was not entitled to attach moveable property without first exhausting his remedies against the tenure on which the rent was a charge. The learned Judges held that by reason of the language of section 100 of the Transfer of Property Act, section 68 was not made applicable and even if it applied after a decree in a suit the section could have no application. This was sufficient to dispose of the case but the learned Judges went further and added that the charge under section 65 of the Bengal Tenancy Act was not a charge as defined by section 100 of the Transfer of Property Act since the Tenancy Act which was intended to benefit a landlord could not be so construed as to deprive the landlord of the rights and remedies enjoyed by an ordinary judgment-creditor. The decision therefore on the point now relevant turned only on the policy of the Tenancy Act. This decision was followed in Madras in *Suramma* v. *Suryanarayana Jagapathirazu*[2], a case under the Madras Estates Land Act. It was there pointed out that a charge under section 100 of the Transfer of Property Act can only arise in respect of payment of money and as rent under the Madras Estates Land Act, may be in respect of money or in kind, it cannot with any consistency be held that the charge for rent was a charge within the

1. (1887) I.L.R. 15 Cal. 492. 2. (1918) 35 M.L.J. 443 : I.L.R. 42 Mad. 114.

meaning of section 100 of Transfer of Property Act in some cases and not in other cases. This view, however, was not accepted by Sadasiva Ayyar, J., in *Venkatalakshmamma* v. *Seetayya*[1]. The learned Judge observed at page 790 :—

"With the greatest respect (referring to the view of Phillips, J., in *Suramma* v. *Suryanarayana Jagapathirazu*[2], I do not see why if a particular charge falls within the words of section 100 it should not be a charge under that section because another kind of charge created by the same statute does not fall within the section. Further even rent payable in kind becomes really payable in money, whenever the rent is sued for and a decree in the alternative for the value of rent payable in kind is asked for and granted."

The question therefore whether a statutory charge for rent under the Tenancy Acts is a charge as defined by section 100 of the Transfer of Property Act turned mostly on the policy of the Acts and the fact that rent was not always payable in money. These difficulties do not arise in the case of a charge under section 85 of the District Municipalities Act, as the tax is always payable in money. So far as I could see there is no particular policy behind the provisions of the District Municipalities Act. Under the analogous provisions under the Municipalities Act obtaining in other Provinces it has been held that a similar charge was within the purview of section 100 of the Transfer of Property Act. See *Shidrao Narayanrao* v. *Athni Municipality*[3] and *Nawal Kishore* v. *The Municipal Board, Agra*[4]. The only other case to which reference has been made in the arguments on this point was the decision in *Corporation of Calcutta* v. *Arunchandra Singha*[5]. All that case lays down is that section 67-A of the Transfer of Property Act does not apply to statutory charges and securities created by operation of law but only to consensual securities created by act of parties. This conclusion was based on the language of section 67-A of the Transfer of Property Act. This decision is no authority in support of the contention of the respondent. I do not find any warrant in the provisions of the District Municipalities Act to hold that the charge under section 85 of the District Municipalities Act is not within section 100 of the Transfer of Property Act. This being so, under section 100 of the Transfer of Property Act,

"All the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such a charge."

The question of limitation applicable to a suit by a second mortgagee after he obtained a decree for sale for redemption of the first mortgagee-purchaser is intimately connected with the question of the right of the second mortgagee-purchaser against the first mortgagee-purchaser when the second mortgagee was not impleaded as a party in the suit by the first mortgagee. The question of limitation therefore and the third contention as to the effect upon the rights of the second mortgagee of the decree obtained by the first mortgagee may be considered together. Whatever may be the views of the other High Courts, so far as our Court is concerned, ever since *Mulla Vittil Seethi* v. *Achuthan Nair*[6], it has been consistently held that the rights of the second mortgagee who was not impleaded as a party to the suit by the first mortgagee remain unaffected by such a suit and by sale in pursuance of that decree. No useful purpose is therefore served by reviewing the cases on the point and a most useful survey of the authorities is to be found in the recent decision of Wadsworth and Govindarajachari, JJ., in *Sooryanarayana Rao* v. *Sarupchand Rajaji*[7].

Section 91 of the Transfer of Property Act confers upon the second mortgagee the right to redeem the prior mortgage and the following section, section 92 defines the rights on such redemption. Under Order 34, rule 1, Civil Procedure Code, it is incumbent upon the first mortgagee to implead in his suit to enforce the mortgage security all persons interested in the right of redemption. The explanation to that rule makes it clear that in a suit by a puisne mortgagee for sale, it is not incumbent upon him to implead the prior mortgagee as a party. If the property is intended to be sold in the second mortgagee's suit free of encumbrance, the consent of the first mortgagee is needed under Order 34, rule 12. Rule 13 of the said

1. (1920) 39 M.L.J. 30 : I.L.R. 43 Mad. 786.
2. (1918) 35 M.L.J. 443 : I.L.R. 42 Mad. 114.
3. A.I.R. 1943 Bom. 21.
4. I.L.R. (1943) All. 453 (F.B.).
5. (1934) I.L.R. 61 Cal. 1047.
6. (1911) 21 M.L.J. 213 (F.B.).
7. (1947) 1 M.L.J. 373.

Order provides the manner in which the sale proceeds in a sale in a pusine mortgagee's suit effected with the consent of the first mortgagee free of encumbrance should be disposed of. It therefore follows that the right of redemption of the second mortgagee under section 91 is not taken away by the decree and sale in the suit by the Municipality and he is entitled to institute a suit for redemption. Needless to state that redemption is a right which the second mortgagee could exercise at his option and a liability to be discharged by him. The present suit therefore being a suit for redemption, naturally is governed by the period of limitation prescribed under Article 148 of the Limitation Act and as this is not a suit for enforcing payment of money Article 132 of the Limitation Act would have no application. On the plain language of Articles 132 and 148 one would have thought that there is no difficulty in deciding the question of limitation and in choosing between the two Articles. The learned District Judge however relied on the decision in *Lakshmanan Chettiar* v. *Sella Muthu Naicken*[1], a decision of a Single Judge of this Court and held that as a fresh suit upon the mortgage by the second mortgagee would now become barred under Article 132 the suit for redemption is also barred. That decision followed a decision of the Calcutta High Court in *Nidhiram Bandopadhya* v. *Sarbessur Biswas*[2]. The decision of the Calcutta High Court, however, was not accepted by a later Full Bench of that Court in *Lakshmanchandra Naskar* v. *Ramdas Mandal*[3]. The other High Courts have also taken the view that in a suit of this description the proper Article applicable is Article 148. *See Mussammat Ramjhari Koer* v. *Lala Kashi Nath Sahai*[4], *Sundar Das* v. *Beli Ram*[5], *Mussamat Ram Kunwar Bai* v. *Mst. Chhitia Bai*[6] and *Priyalal* v. *Bohra Champa Ram*[7]. All these decisions were reviewed and followed in a later Bench decision of this Court which unfortunately is not reported in S.A. No. 304 of 1926 by *Wallace and Anantakrishna Ayyar, JJ.* I am therefore of opinion that the view of the Court below that the suit is barred by limitation cannot be upheld.

As stated already, the right of redemption of the second mortgagee purchaser has not been affected by the decision and sale in the suit by the first mortgagee. Reliance has been placed on behalf of the respondent on the decision of the Full Bench in *Nagendran Chettiar* v. *Lakshmi Ammal*[8], in support of the contention that the first mortgagee purchaser is entitled to continue in possession as against the second mortgagee purchaser and reference was made to certain observations in that judgment at pages 858-859. The Full Bench dealt with the question of the preferential right to possession between the purchasers in the suit by the first mortgagee and in the suit by the second mortgagee in which decrees were obtained and sales were held, the one without impleading the other. The Full Bench held that priority of the date of purchase of the mortgagor's right to possession conferred priority of title to possession. But, it must be noted even according to the Full Bench, it is only until the rights of the parties are worked out in a properly constituted suit this right to possession continues. This suit is not one for recovery of possession by one purchaser against the other, but is a suit for redemption. The decision, therefore, of the Full Bench, does not at all help the respondent. At page 861 in the judgment of the Full Bench it is pointed out that when the second mortgagee brought the property to sale after purchase in execution of a decree obtained by the first mortgagee purchaser in execution of the decree the second mortgagee gets " nothing " is wrong. He purchases something and that something must be worked out in a later suit and this is what is being attempted in the present suit by the appellant. I therefore do not see anything in the Full Bench which takes away the rights of the second mortgagee purchasers. I therefore hold that the District Judge was wrong in concluding that the second mortgagee purchaser acquired nothing under his purchase and that therefore this suit was not maintainable.

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1. (1924) 47 M.L.J. 602.
2. (1910) 14 C.W.N. 439.
3. (1929) I.L.R 57 Cal. 403.
4. (1926) I.L.R. 5 Pat. 513
5. A.I.R. 1933 Lah. 503.
6. I.L.R. 1937 Nag. 367.
7. (1923) I.L.R. 45 All. 268.
8. (1933) 65 M.L.J. 108 : I.L.R. 56 Mad. 846 (F.B.).

The only other question that remains to be considered is whether the decree for accounting passed by the trial Court is proper or not. This question has been elaborately considered in the decision reported in *Natesan Chettiar* v. *Ramalingam Chettiar*[1]. In the light of that decision, I do not see any substance in the contention urged on behalf of the respondent. A further contention has also been advanced by Mr. Sivaramakrishna Aiyar for the respondent that in any event as his client by virtue of his prior purchase acquired the right of redemption of the mortgagors he should be given the right to redeem the second mortgagee even if the second mortgagee is permitted to redeem the first mortgage. This contention was not raised in the Courts below. I will not therefore be justified in permitting him to raise it for the first time in second appeal.

For these reasons, I reverse the decree of the learned District Judge and restore that of the District Munsiff with costs here and the Court below.

No leave.

K.S. *Appeal allowed.*

IH THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE RAJAMANNAR.

Sakhamuri Peraya and others .. *Appellants**

v.

Nimmaraju Kondayya and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), *sections* 37 *and* 54—*Sale deed executed more than three months before insolvency petition—Compulsory registration within the three months—Registration whether amounts to act of transferor—Sale of property by insolvent after insolvency proceedings—Binding effect on parties—Effect of annulment of insolvency—Set-off—Claims arising out of same transaction—Counter-claim made after limitation period—Sustainability in case between vendor and vendee.*

Where the transferor had executed a sale deed more than three months before the insolvency petition filed by his creditor, and it was shown that he had no reason to expect that the creditor would file the petition, and although he knew that the document would have to be registered he had no reason to think that it would not be registered until within three months of the filing of the insolvency application, and he was not a party to the registration of the deed which was done compulsorily within three months before the insolvency petition,

Held, that, under the circumstances the act of registration was not an act of the transferor within the meaning of section 54 of the Provincial Insolvency Act.

Venkadari Somappa v. *Official Receiver of Bellary*, (1938) 2 M.L.J. 362, considered.

There is no statutory prohibition against the sale of property by an insolvent after the insolvency proceedings have been initiated. The vesting of property in the Official Receiver is for the benefit of the creditors and so does not purport to affect transactions between the insolvent and other persons, except in so far as they affect the administration of the insolvent's estate for the benefit of the creditors. As far as the parties to the transactions are concerned they are binding on them.

Shiam Sarup v. *Nand Ram*, (1921) I.L.R. 43 All. 555 and *Rup Narain Singh* v. *Har Gopal Tewari* (1933) I.L.R. 55 All. 503, referred to.

The effect of the annulment of the adjudication relates back to the date of the adjudication and is as if no adjudication had taken place, except as regards the acts of the Court and the Official Receiver which are validated by section 37 of the Provincial Insolvency Act.

Where at the time when the sale was executed the insolvent had every reason to believe that he had title to the property and he purported to transfer the whole title to the vendee but on account of subsequent insolvency proceedings title could not be conveyed,

Held, that, the transferee became entitled to the property by virtue of section 43 of the Transfer of Property Act as soon as the insolvency proceedings had been annulled and title restored to the transferor.

The cause of action for the suit to recover upaid purchase money arose because the sale had not been given effect to, in that the consideration for the sale had not been paid. As effect had not been given to the sale because possession was not allowed to remain in the hands of the transferee and was subsequently retained by the transferor, the first defendant prayed for a set-off of the amount due to him as mesne profits for the period he was kept out of possession.

Held, that the claims for mesne profits and for the unpaid purchase money arose out of the same transaction, and that they could be set-off against each other.

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[1] 1937 M.W.N. 700.

* Appeals Nos. 600 and 601 of 1945. 28th November, 1947.

The ordinary rule is that a counter-claim can only be allowed if it is not barred by time. Certain exceptions are recognised such as in accounts between a trustee and *cestui que trust*, or where the claim arises out of mutual accounting. But the case of a vendor and vendee cannot be brought under the exceptions to the rule.

Appeal against the decrees of the Court of the Subordinate Judge of Guntur, in O.S. Nos. 69 of 1943 and 73 of 1943 respectively.

M. S. Ramachandra Rao for Appellants.

K. Kameswara Rao and *B. S. Ramachandra Rao* for Respondents.

The judgment of the Court was delivered by

Horwill, J.—On 10th August, 1931, the plaintiff in O.S. No. 69 of 1943, hereafter referred to as the plaintiff, and the fifth defendant in O.S. No. 69 of 1943, hereafter referred to as the fifth defendant, executed a sale deed, Ex. D-3, for Rs. 8000 in favour of the first defendant (in O.S. No. 69 of 1943). Rs. 1100 were paid in cash, and the remaining Rs. 6,900 were to be paid before the Sub-Registrar at the time of the registration. As the plaintiff and the fifth defendant were not willing to have the document registered, the first defendant on 24th November, 1931, presented the document before the Sub-Registrar for compulsory registration. It was subsequently registered on 1st December, 1931. In the meanwhile, on 18th November, 1931, I.P. No. 119 of 1931, was filed by a creditor to adjudicate the fifth defendant an insolvent. He was so adjudged on 3rd September, 1932. Proceedings were then instituted by the Official Receiver to have the alienation evidenced by Ex. D-3 set aside. It was declared void against the Official Receiver under section 53 of the Provincial Insolvency Act by the Subordinate Judge, but in appeal to the District Judge the sale was set aside under section 4 of the Act, the order under section 53 being cancelled. The matter was brought up to the High Court in C.R.P. No. 1664 of 1943 ; but when that petition came before King, J, the attention of the learned Judge was drawn to the circumstance that the fifth defendant had entered into an arrangement with his creditors and that the adjudication had been annulled under section 35, on 26th August, 1944. Without deciding the case on its merits, King, J., held that the petition was unnecessary and dismissed it. O.S. No. 69 of 1943 was filed by the plaintiff on 6th August, 1943 for the recovery of the unpaid purchase money. The first defendant prayed for a set-off of the amount due to him as mesne profits for the period he was kept out of possession. A few days later, on 10th August, 1943, the first defendant filed O.S. No. 73 of 1943 for possession and future mesne profits. O.S. No. 73 of 1943 was decreed in favour of the first defendant. O.S. No. 69 of 1943 was also decreed, the set-off being allowed to the extent of three years' mesne profits, the remainder of the claim being held to be barred by limitation. The plaintiff and the 5th defendant have filed joint appeals against these decrees, and the first defendant has filed a Memorandum of Cross-Objections with regard to the disallowance of mesne profits beyond the three years immediately preceding the suit.

The first defendant's main arguement is that for the purpose of insolvency proceedings the date of the sale must be deemed to be 1st December, 1931, the date of the compulsory registration and not 10th August, 1931, the date on which Ex. D-3 was executed. Then since the adjudication, dated back to 18th November, 1931, the date on which I.P. No. 119 of 1931 was presented, the alienation took place during the course of the insolvency proceedings and was therefore void ; because under section 28 of the Provincial Insolvency Act the property had vested in the Official Receiver.

The authority for the argument that in insolvency proceedings the date of the transaction must be deemed to be the date of the registration and not the date of sale, despite the provisions of section 47 of the Registration Act, is based on the judgment in *Venkadari Somappa* v. *Official Receiver of Bellary*[1], of Madhavan Nair and Stodart, JJ., who had to consider a case where the registration had taken place

1. (1938) 2 M.L.J. 362.

within three months of the insolvency, but where the execution of the sale deed was said to have been more than three months before the date of insolvency petition. The question that fell for decision was whether a petition under section 54 would lie. They held that the transfer was not complete until it was registered and relying on the wording of section 54 of the Act that a transfer by way of mortgage is deemed fraudulent and void if executed within three months from the date of execution, said :

> " If he (the insolvent) does so (presents the instrument for registration) and the instrument is registered, he is doing something which is void if an insolvency petition is presented within three months."

The learned Judges then went on to consider the argument of Mr. Somayya that since the transferee had presented the deed for compulsory registration, the act of registration was not the act of the transferor. They said :

> " Can it be said that the transferor does not convey the property when the registration which is an essential part of the conveyance is effected against his will ? We think not. But if the transferor conveys the property he must be held to have done everything necessary to the conveyance. The registration therefore is in effect the act of the transferor. Practically speaking when he has duly executed the document and with the intention that it should be registered has delivered it to the transferee—who is entitled to present it for registration—he has irrevocably consented to the registration, and when on account of his subsequent denial of execution the document is ultimately registered under section 75 of the Registration Act, that registration must be held to have been effected on his behalf and with his consent."

With respect, we feel that although it is true when the transferor executed the document, he intended that the document should be registered ; yet he did not contemplate that the registration would be delayed until some time within three months of the presentation of an insolvency petition. In this case, as in the case before those learned Judges, the transferor was not a party to the registration. He had executed the deed more than three months before the insolvency petition was filed at a time, as far as we know, when he had no reason to expect that a creditor would file an insolvency petition against him. Although, therefore, he knew that the document would have to be registered, yet he had no reason to think that it would not be registered until within three months of the filing of an insolvency application. However that may be, the learned Judges did not purport to lay down the general proposition that section 47 of the Registration Act was not meant to apply to any transaction which was the subject of insolvency proceedings, the learned Judges merely considering the question whether if the registration took place within three months of the filing of an insolvency application, an application under section 54 of the Provincial Insolvency Act would lie.

Even if we assume that the sale took place during the course of the insolvency proceedings, we do not agree with the learned advocate for the appellant that the transaction was void for all purposes, merely because under section 28 of the Insolvency Act the property vested in the Official Receiver. Admittedly, there is no statutory prohibition against the sale of property by an insolvent after insolvency proceedings have been initiated ; and so the argument can only proceed on the basis that the insolvent had no property with which he could deal. The vesting of the property in the Official Receiver is for the benefit of the creditors ; and so does not purport to affect transactions between the insolvent and other persons, except in so far as they affect the administration of the insolvent's estate for the benefit of the creditors. As far as the parties to the transaction are concerned, they are binding on them. The effect of an alienation by the insolvent was considered by a Bench of the Allahabad High Court in *Rup Narain Singh* v. *Har Gopal Tewari*[1], which purported to follow another decision of the same Court in *Shyam Sarup* v. *Nand Ram*[2], and the learned Judges there pointed out that there being no statutory prohibition to such a transfer it is binding on the parties.

The validity of such a transfer has also been upheld upon an interpretation of section 37 of the Provincial Insolvency Act as to the effect of an annulment of

1. (1933) I.L.R. 55 All. 503. 2. (1921) I.L.R. 43 All. 555.

the adjudication. The matter has come before this Court on many occasions, the first being as early as *Ramaswami Kottadiar* v. *Murugesa Mudali*[1], which was followed in *Kothandaram Ravuth* v. *Murugesa Mudaliar*[2]. Those decisions were at a time when the law govering insolvency was the Indian Insolvency Act, 11 and 12, Victoria, 1848. The learned Judges relied *inter alia* on the use of the words " null and void " in that statute. In subsequent legislation those words have not been used ; but we find no reason to think that the effect of the later statutes was any different from what it was at the time when *Ramaswami Kottadiar* v. *Murugesa Mudali*[1] and *Kothandaram Ravuth* v. *Murugesa Mudaliar*[2], were decided. The effect of the present section 37 has been considered by Beasley, C.J., in *Lingappa* v. *Official Receiver of Bellary*[3], King, J., in *Dharmasamarajayya* v. *Sankamma*[4], and Somayya, J., in *Ratnavelu Chettiar* v. *Franciscu Udayar*[5], and the learned Judges have held that the effect of the annulment of the adjudication relates back to the date of the adjudication and is as if no adjudication had taken place, except as regards the acts of the Court and the Official Receiver which are validated by that section. Section 37 says :

" Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid ; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare."

Somayya, J., very pertinently points out in *Ratnavelu Chettiar* v. *Franciscu Udayar*[5], that if the annulment was not to have retrospective effect, there would be no need for the clause validating acts done by the Court or by the Receiver, as they would be valid ; because they were done at a time when the insolvent had been adjudicated and before the adjudication had been annulled ; and so had jurisdiction to do the acts they did. If, however, the annulment were to date back to the date of adjudication, it would, unless validating clauses were introduced, have the effect of setting at nought all that they had done to disturb the rights in property created by the Court and the receiver.

It further seems to us that section 43 of the Transfer of Property Act can be evoked by the first defendant ; for at the time when the sale was executed, the insolvent had every reason to believe that he had title to the property and he in fact, together with the plaintiff, purported to transfer the whole title to the first defendant. If on account of subsequent insolvency proceedings, title could not be conveyed, then, by virtue of section 43, the first defendant became entitled to the property as soon as the insolvency proceedings had been annulled and title restored to the fifth defendant. On this point, Mr. Ramachandra Rao has referred to the decision of Beasley, C.J., and Bardswell, J., in the *Official Assignee, Madras* v. *Sampath Naidu*[6], where the learned Judges considered whether an alienation made by a reversioner conveyed title to the transferee upon the reversioner's subsequently becoming entitled to the property. It had been held in two decisions of this Court i.e, *Alamanayakunigari Nabi Sab* v. *Murukutti Papiah*[7], and *Muthuswami Pillai* v. *Sandana Velan*[8], that title would pass to the transferee ; but Beasley, C.J., and Bardswell, J., held that such a transaction offended the provisions of section 6 (*a*) of the Transfer of Property Act, because all that the reversioner had to convey was a *spes successionis*. It made no difference, they thought, that the reversioner purported to convey more ; for to hold otherwise would enable parties to overcome the obstacle of section 6 (*a*) of the Transfer of Property Act and to convey what could not by that section be conveyed. The learned Judges realised that the illustration of section 43 of the Transfer of Property Act suggested that such a transfer would be good ; but they held that the illustration was bad law. Even if the *Official Assignee, Madras* v. *Sampath Naidu*[6], was rightly decided, it can certainly be dis-

1. (1897) 7 M.L.J. 229 : I.L.R. 20 Mad. 452.
2. (1903) 13 M.L.J. 372: I.L.R. 27 Mad. 7.
3. (1937) 47 L.W. 366.
4. (1943) 1 M.L.J. 166.
5. (1945) 1 M.L.J. 472.
6. (1933) 65 M.L.J. 588.
7. (1915) 29 M.L.J. 733.
8. (1926) 53 M.L.J. 218.

tinguished from the transfer now under consideration. The parties to Exhibit D-3 certainly had no intention of avoiding the prohibition in section 6 (*a*) of the Transfer of Property Act. At the time when Ex. D-3 was executed, the insolvent not merely had a *spes successionis* but, with the plaintiff, full right and title to the property which they sought to convey by that document. If, because of the subsequent insolvency proceedings, the fifth defendant was unable to convey any title, title would pass to the transferee as soon as the obstacle was removed and the fifth defendant re-obtained title to the property.

With regard to the appeal against the decree in O.S. No. 69 of 1943, it is further argued on behalf of the plaintiff and the fifth defendant that the lower Court ought not to have allowed the set-off. Some of the arguments of Mr. Ramachandra Rao cannot be heard, because they were not raised in the memorandum of appeal; but there remains for consideration the contention that the claims for mesne profits and for the unpaid purchase money did not arise out of the same cause of action. The cause of action in the suit arose because the sale had not been given effect to, in that the consideration for the sale had not been paid. Effect had further not been given to the sale, because possession was not allowed to remain in the hands of the transferee and was subsequently retained by the transferor. That gave rise to the first defendant's claim for mesne profits. Both claims therefore arose because the sale had not been given effect to. We can therefore see no obstacle to the set-off on this ground.

Another argument is that the decree that was passed was a joint decree in favour of the plaintiff and the fifth defendant, whereas the set-off could be against the plaintiff alone ; for mesne profits could not be granted against the fifth defendant, who had not himself obtained possession, his share of the property having been enjoyed by the Official Receiver. We find, however, that although it is true that the Official Receiver obtained possession of the fifth defendant's share of the land, the proceeds were utilised for discharging the debts of the creditors and thereby enabling the fifth defendant to enter into a composition with them. The fifth defendant therefore derived the same benefit from the land as if he had enjoyed it directly. So in equity the first defendant was entitled to ask that the mesne profits from the fifth defendant's half share of the land, as well as from the plaintiff's half share, should be set-off against the amount due to the plaintiff and the fifth defendant by way of unpaid purchase money and subsequent interest.

It is argued that the mesne profits decreed by the lower Court were estimated in an arbitrary manner and not based on any sound principles. Although the passages read out to us from the judgment perhaps suggest that this was so, we find that there was a considerable body of evidence bearing on this question ; and we are not prepared to say that the lower Court did not arrive at the figure of Rs. 30 an acre on materials before it.

A memorandum of Cross-Objections has been filed by the plaintiff against the disallowance by the lower Court of mesne profits beyond a period of three years, despite the fact that it allowed interest to the plaintiff and the fifth defendant from the date of the transaction. The ordinary rule is that a counter claim can only be allowed if it is not barred by time. Certain exceptions are recognised, such as in accounts between a trustee and *cestui que trust* or where the claim arises out of mutual accounting. Such an exception has been made to claims arising out of a mortgage where the value of the mesne profits has to be taken into account to ascertain what is due under the mortgage deed ; but we are not prepared to extend the recognised exceptions to the relations between a vendor and a vendee. It is true that since the plaintiff sought to enforce his vendor's lien, the decree will bear some resemblance to a mortgage decree ; but the relationship between the parties is altogether different from that between a mortgagor and a mortgagee.

A slight modification of the decree is however necessary. It has been pointed out that the suit was not a simple money suit and that the decree has declared a charge. The charge however existed even before the suit was filed and so was not

created by the decree. A preliminary decree should therefore have been passed, giving time to the first defendant to pay the amount decreed.

The appeals are therefore dismissed with costs, one Advocate's fee, except that the decree of the lower Court will be modified by drawing it up in the form of a mortgage decree, giving the first defendant six months from this day in which to pay the sum due. The Memorandum of Cross-objections is dismissed with costs.

B.V.V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

P. N. S. Aiyar .. *Petitioner**

v.

K. J. Nathan .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 200, 202 (1) proviso and 537—Complaint before a Presidency Magistrate —Non-examination of complainant on oath before postponement of the issue of process and directing inquiry by police—Legality—No difference between Presidency Magistrate and other Magistrates in this respect after amendment of Code in 1923—Defect if curable under section 537.

The proviso to section 202 (1), Criminal Procedure Code, enacted when the Code was amended in 1923 makes it absolutely clear that there is no difference between any other Magistrate and a Presidency Magistrate in the case of examining the complainant, before the postponement of the issue of process and the ordering of an inquiry under section 202 (1). Such examination will elucidate matters to a great extent if the complaint is oral and will probably clarify the situation if it is written. In either case, the Magistrate should ascertain the truth or falsehood of the complaint by an examination on oath of the complainant, before he sends the complaint to the police for inquiry. Such non-examination on oath is not an error, omission or irregularity in the complaint. It is a non-observance of a mandatory provision of law the infraction of which is a disregard of an express provision of law as to the mode of inquiry and as such not a mere irregularity such as could be remedied by section 537, Criminal Procedure Code. It is an illegality which goes to the very root of the proceedings.

Case-law discussed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated 9th June, 1947 and made in C.C. No. 1292 of 1947.

K. V. Ramaseshan for Petitioner.

B. T. Sundararajan and *M. Srinivasagopalan* for Respondent.

Santosh for the Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The complainant in C.C. No. 1292 of 1947 on the file of the Court of the Chief Presidency Magistrate is the petitioner in this criminal revision case, which is to revise the order of the learned Magistrate dated 9th June, 1947, dismissing the complaint under section 203, Criminal Procedure Code, on the ground that there were no sufficient reasons to proceed with it, any further. The lower Court took the complaint on file and forwarded the same to the Commissioner of Police for investigation under section 202 and for the submission of a report by 16th of May, 1947. Accordingly, the police enquired into the matter and submitted their report to the lower Court. After considering this report, the learned Magistrate found that there was no justification for proceeding with the complaint and dismissed the same.

It may be stated at the outset that the complaint was not an oral one, but had been reduced to writing before presentation to the Court and its contents were read over and explained to the complainant on the 2nd May, 1947, when it was presented ; and he admitted the same to be correct on solemn affirmation administered in the presence of the learned Magistrate. According to the record of the

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* Cr.R.C. No. 612 of 1947. (Cr.R.P. No. 507 of 1947). 10th February, 1948.

proceedings before the lower Court, it is found that the complainant was not examined on oath by the Chief Presidency Magistrate.

The learned counsel for the petitioner contended before me, that it was obligatory on the Magistrate to examine the complainant on oath under the provisions of section 200, Criminal Procedure Code, before postponement of the issue of process and directing investigation by the police officer ; and in this case, since such a course had not been followed by the Magistrate, his procedure in rejecting the complaint under section 203 is illegal. The question therefore for consideration is how far the provisions of section 200 read with proviso to section 202 are applicable to the facts of the present case. Section 200, proviso (*b*) lays down that where the Magistrate is a Presidency Magistrate, the examination contemplated by the earlier portion of the section may or may not be on oath as the Magistrate in each case thinks fit. But in any case, unlike any other Magistrate, who when taking cognizance of an offence on complaint, is obliged to examine the complainant on oath, a Presidency Magistrate is given the discretion to dispense with the examination on oath but the power is not given to him to completely do away with, any kind of examination at all. What has happened before the learned Presidency Magistrate in the case in question, is that the contents of the complaint were admitted to be correct on solemn affirmation by the complainant. It cannot be said that this is an examination of the complainant either on oath or otherwise. All that the complainant has done is, to state before the Court that the averments mentioned in the complaint are true and nothing more. The examination of the complainant signifies that the Magistrate ought to interrogate him on the allegations or averments contained in the complaint to test whether they are *prima facie* true or not. Nothing like that has been done in the present case.

The proviso to section 202 (1) is as follows :

"Provided that, save, where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200."

This proviso was, for the first time, enacted when the Code was amended in 1923. Even then, the whole of this provision was not in existence. The words, "*save where the complaint has been made by a Court*" were inserted only by an Amending Act (Act II of 1926). For the purpose of the present case this addition to the proviso is immaterial. What we have to find out is whether on the proviso as it stands now, it is an obligatory duty on the Magistrate before postponement of the issue of process by directing a police officer to inquire into the case, to examine the complainant on oath under the provisions of section 200. That there is such an obligation cast upon the Magistrate is clear from the words of the section itself. If any authorities were necessary, they are found in the decisions in *Rekha Chamar* v. *King-Emperor*[1] and *Bhagwan Das* v. *Emperor*[2]. Both these cases dealt with the complaints before ordinary mofussil Magistrates and not before a Presidency Magistrate. In Re *Velu Nattan*[3], Spencer, J., has observed that a Presidency Magistrate may dismiss a complaint under section 203 on a police report without examining the complainant. The verification on oath of a complainant before a Magistrate is a sufficient compliance with the provisions of section 203. The omission to examine will, at the most, amount to an irregularity of the description covered by section 537, Criminal Procedure Code. The learned Judge relies upon a decision of the Allahabad High Court in *Queen-Empress* v. *Murphy*[4]. It has to be observed that this decision was long prior to the insertion of the proviso in section 202 (1). One can safely assume that when the proviso was inserted, the framers of the statute were aware of the decision in Re *Velu Nattan*[3], and the proviso was enacted with the object of making that decision no longer of any binding authority. Mr. B. T.

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1. A.I.R. 1924 All. 664.
2. A.I.R. 1935 All. 745.
3. (1911) 22 M.L.J. 155 : I.L.R. 35 Mad. 606.
4. (1887) I.L.R. 9 All. 666.

Sundararajan for the accused argues that the words " unless the complainant has been examined on oath under the provisions of section 200 " denote that if no examination on oath is compulsory under section 200, it will not be necessary for the Presidency Magistrate to examine the complainant on oath where he postpones the issue of process. I am unable to agree with this contention. If it had been the intention of the Legislature to dispense with the examination on oath of a complainant by a Presidency Magistrate, where he postpones the issue of process, the section would have been worded thus :

> " Provided that save where the complaint has been made by a Court or *to a Presidency Magistrate* no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200".

In the absence of any words to that effect in the section it is impossible to hold that the imperative necessity of examining a complainant on oath inserted by the proviso has been dispensed with in the case of a Presidency Magistrate. That this view is correct is seen from the report of the Joint Committee on the bill to amend the Code of Criminal Procedure, published in the *Gazette of India*, part V, dated 9th September, 1922, page 256 at 260, where it is stated as follows :

> " We consider that Presidency Magistrates should be required to examine the complainant and to record his statement in cases where the Court intends to postpone issue of process and order any inquiry under section 202 (1)."

The unamended proviso contained the words, " where such examination is prescribed by the Code " and they were purposely omitted by the amendment. If these words had been there, it could have been successfully contended that there was no obligation upon the Court to examine a complainant on oath where the Magistrate is a Presidency Magistrate. The omission of those words and the insertion of an exemption where the complaint is by a Court make it absolutely clear that there is no difference between any other Magistrate and a Presidency Magistrate in the case of examining the complainant before the postponement of the issue of process and the ordering of an inquiry under section 202 (1).

Mr. Sundararajan relies upon a decision in *In re Mirabai Sheik Hussein*[1], as authority for holding that only when a written complaint made before a Magistrate, is obscure or vague, is the Magistrate bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made ; and when, however, the complaint is made in writing and is sufficiently clear, it may frequently be a sufficient compliance with section 202 if the Magistrate reads it over to the complainant and he is asked on oath to subscribe it. No doubt, this decision of Chandavarkar and Aston, JJ., was passed on a criminal revision case from a Presidency Magistrate, but at the time, it was passed on 18th July, 1904, the proviso to section 202 was not in the Code. The other decision which he invited my attention to, was one by the Court of the Judicial Commissioner of Sind reported in *Hashim Moosa* v. *Mrs. G. Booth*[2]. All that I need say is that the revision petition there, did not arise from any order of a Presidency Magistrate as in this case.

Apart from authority, on principle also the above view is essentially justified. It may be that when a complainant is examined on oath by the Magistrate, more facts are likely to be elicited than are originally obtained from a complainant. Where the complaint is oral, an examination will certainly elucidate matters to a great extent and where it has been reduced to writing an examination would probably clarify the situation. In either of these contingencies, before the Magistrate sends the complaint to the police for inquiry, he should ascertain the truth or falsehood of the complaint by an examination on oath of the complainant.

The failure by the Magistrate to observe this mandatory provision of the Code cannot be cured, in my opinion, by section 537, Criminal Procedure Code. The non-examination on oath is not an error, omission or irregularity in the complaint. It is a non-observance of a mandatory provision of law, the infraction

1. (1904) 6 Bom.L.R. 662. 2. A.I.R. 1932 Sind 58.

of which, is, according to the decision of their Lordships of the Judicial Committee in *Subramania Aiyar* v. *King Emperor*[1], a disregard of an express provision of law as to the mode of inquiry and as such was not a mere irregularity such as could be remedied by section 537, Criminal Procedure Code. It is an illegality which goes to the very root of the proceedings. I am therefore of opinion that the learned Chief Presidency Magistrate has erred in law in not complying with the provisions of section 202, Criminal Procedure Code. The order of the learned Magistrate is set aside and he is directed to enquire into the matter afresh by examining the complainant on oath and dispose of the complaint according to law, in the light of the observations in this judgment.

I desire to be distinctly understood that this judgment of mine, should not, in any way, be interpreted as either accepting or rejecting any of the allegations made in the complaint. I am expressing no opinion whatever, on the merits of the complaint.

V.P.S. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

A. M. S. Sheik Muhammed Maracair .. *Petitioner*.*

v.

Bathummal Beevi .. *Respondent.*

Transfer of Property Act (IV of 1882), section 6—Mere right to sue—Suit by principal against agent for taking accounts and for recovery of moneys due to principal—Preliminary decree in favour of principal—Assignment of the right to recover the money to another—Validity—If could be recognised by Courts—Civil Procedure Code (V of 1908), Order 22, rule 10.

A lady executed a power of attorney in favour of the petitioner herein authorising him to manage her properties and to make collections of rents and profits of properties belonging to her. The agent (petitioner) continued to manage until the power was revoked and a suit was instituted by the principal for an account of moneys remaining due in the agent's hands and for recovery of the same after taking accounts. But during the proceedings she assigned her rights to the present respondent and authorised him to join himself as a plaintiff, if necessary. After the preliminary decree was obtained in the suit the lady died and the respondent applied under Order 22, rule 10, Civil Procedure Code, to be impleaded as a party on the strength of the assignment. On the questions whether the assignment under the document was a mere right to sue and not the property itself and whether the order recognising the assignment was valid,

Held, that the order recognising the assignment was correct. The transfer was of the property in the hands of the petitioner. It may be that the assignee might have to institute a suit or as here, may have to continue the suit after the preliminary decree. But that would not make the assignment any the less an assignment of property.

Syud Tuffuzzool Hossein Khan v. *Rughoonath Pershad*, (1871) 14 M.I.A. 40 and *Annu* v. *Somasundara*, (1930) 62 M.L.J. 45 : I.L.R. 54 Mad. 654, distinguished.

Madho Das v. *Ramji Patak*, (1894) I.L.R. 16 All. 286 and *Ramiah* v. *Rukmini Ammal*, (1912) 24 M.L.J. 313, applied.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tuticorin, dated 16th November, 1946, in C.M.A. No. 10 of 1946, in I.A. No. 16 of 1946, in O.S. No. 130 of 1942, District Munsiff Court, Srivaikuntam.

K. Veeraswami for Petitioner.

A. Swaminatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is filed by the defendant against the order of the Subordinate Judge of Tuticorin upholding the decision of the District Munsiff of Srivaikuntam passed under Order 22, rule 10 of the Civil Procedure Code.

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1. (1901) 11 M.L.J. 233 : L.R. 28 I.A. 257 : I.L.R. 25 Mad. 61 (P.C.).

*C.R.P. No. 781 of 1947. 27th November, 1947.

One Bathummal Beevi executed a power of attorney in favour of the defendant authorising him to manage her properties and to make collections of the rents and profits of the shops and buildings. The defendant who was thus constituted the plaintiff's agent continued to manage until the power of attorney was revoked. As the defendant did not render an account of his management to Bathummal Beevi, the principal, she instituted a suit for an account and for recovery of the amount found due after taking acccounts. She assigned her rights in the money due from the defendant to the present respondent on the 3rd July, 1943, whereby the assignee was clothed with rights to recover from the defendant all the amounts belonging to the assignor and remaining in the hands of the defendant; and, if necessary by joining himself as a plaintiff in the suit already instituted. There was a preliminary decree in the suit on the 23rd September, 1943, and the original plaintiff died on the 13th November, 1945. On the 27th December, 1945, the assignee applied under Order 22, rule 10 of the Code to implead him as a party to the suit on the strength of the assignment. The District Munsiff recognised the assignment and impleaded him as plaintiff. This order was confirmed on appeal by the Subordinate Judge.

In this revision petition against the order of the Subordinate Judge the only point urged on behalf of the petitioner is that the order of the learned Judge recognising the assignment as valid, is erroneous as what was assigned under the document was a mere right to sue and not the property. The question is whether this contention is well founded.

Under section 6 of the Transfer of Property Act property of any kind may be transferred and one of the exceptions is that a mere right to sue cannot be transferred. It is urged on behalf of the petitioner that the right claimed by the principal against the agent in this suit is merely a right to damages and not property. It must be noted here that the basis of the plaintiff's claim against the defendant is not that the agent was guilty of any act of negligence and that therefore she is entitled to recover money from the defendant as damages. Her case is that certain property was entrusted to the defendant as agent for management and that during the course of such management he failed to pay to her the balance due after rendering proper accounts. In essence, therefore, the claim is that her property remained in the hands of the defendant and that she is entitled to recover it back. It is difficult to see how a claim of this kind can be said to be a mere right to sue. No doubt in order to recover the property of the plaintiff in the hands of the defendant a suit may be necessary if an account is not rendered by the defendant, the agent, and the balance in his hands is not made over to the plaintiff, the principal. But that does not mean that what is assigned is merely a right to institute the suit. In my opinion the transfer is of the property in the hands of the defendant. It may be that the assignee may have to institute a suit or as in the present case, may have to continue the suit already instituted. But that would not make the assignment any the less an assignment of the property. In cases where a person sues merely for damages there is no property in the hands of the defendant in the action; the assignment of that right could clothe the assignee merely with a right to institute an action and recover whatever is possible to recover in such a suit. The object of the assignment is not to transfer any property but merely a right of action.

Bearing these facts in mind the decisions cited by the learned Advocate-General on behalf of the petitioner may now be considered. The case on which considerable reliance has been placed by him is the decision reported in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*[1]. In that case a decree-holder who could not recover anything from the judgment-debtor attached as the property of the debtor, a certain claim in a pending arbitration between the judgment-debtor and his *quondam* partner. The property attached is described as a " claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitrators." This claim was brought to sale and was purchased by the appellant before the Judicial Committee. One of the questions which their Lordships had to consider

1. (1871) 14 M.I.A. 40.

was whether the claim attached was property within the meaning of section 205 of the Civil Procedure Code, Act VIII of 1859, corresponding to the present section 60. In dealing with this question their Lordships observed at page 46 :

"The sum so claimed, however, had no existence at the time of the attachment,; it was not a debt nor liability at that time from *Sheonath* (the *quondam* partner) to *Ramanath's* (judgment-debtor's) son ; it was a debt created by the award. and not the liquidation of a preceding unliquidated demand *ex contractu*. It was (amongst other matters) an award of an extinguished share of debts which were till then debts due to the partners jointly, and became under the award. the sole property of *Sheonath*".

Again at page 51 their Lordships state :

"In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled. The uncertainty, at the time of the attachment and sale was not limited to a mere question of quantum ; it was wholly uncertain, as Sir George Couper has correctly explained in his judgment, in what the arbitration might terminate."

It would be seen from these passages, therefore, that at the time of the attachment there was no award, no debt and no unliquidated claim based on any contract which resulted in an award after ascertainment of the amount due. That case, therefore, in my opinion, has no analogy to the present case which, as stated above, is based on the allegation that the defendant is in possession of the funds of the lady and that the only thing that remained to be done was to ascertain the amount.

The other decision in *Annu* v. *Somasundara*[1], relied on, on behalf of the petitioner does not help the petitioner's contention. All that was decided there was that in a suit by the principal against the agent it is possible to give a decree in favour of the agent against the principal. In discussing the question of limitation the learned Judges had to consider the essence of a suit for account by the principal against the agent ; and it was pointed out that it was not to be regarded as a suit for compensation for breach of contract, which emphasises the fact that the right is not a mere right to sue. The question was considered by the Allahabad High Court in *Madho Das* v. *Ramji Patak*[2]. That decision is not under the Transfer of Property Act but under the Civil Procedure Code, the point being whether a money due by an agent or vendee to the principal or vendor is attachable in execution while the exact amount due to the principal or vendor had not been ascertained before the attachment and sale. After considering the decision in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*[3], and also the other cases, the principle has been laid down in that case at page 293 as follows :

"There can, in our opinion, be no doubt that money or a balance in the hands of an agent, which he has received from, or holds for, his principal to be applied to certain purposes can be recovered from that agent as money had and received to the use of the principal, if the agent fails to apply it, or if the agent having applied part of it, a balance remains in the hands of the agent ; and the fact that when the principal brings his suit to recover such balance he may, until the agent's accounts are produced be unable to specify the particular amount of the balance remaining in his agent's hands and due to him does not prevent such balance being a debt due to the principal."

This view has been applied by a Bench of our Court in *Ramiah* v. *Rukmini Ammal*[4], and there are also other decisions which support this view. It is unnecessary to refer to all of them in detail. Reliance, however, has been placed by the learned Advocate-General on the decision in *Khetra Mohan Das* v. *Biswanath Bera*[5], but that decision was not followed in the Calcutta High Court itself in *Rajeswar* v. *Sheik Yadali*[6], and as it is opposed to the decision of our High Court, no useful purpose will be served in dealing with that decision.

The view taken by the Courts below regarding the assignment is correct. The result is this revision petition fails and is dismissed with costs.

K.C. ——— *Petition dismissed.*

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1. (1930) 62 M.L.J. 45 : I.L.R 54 Mad. 654.
2. (1894) I.L.R. 16 All. 286.
3. (1871) 14 M.I.A. 40.
4. (1912) 24 M.L.J. 313.
5. (1924) I.L.R. 51 Cal. 972.
6. A.I.R. 1933 Cal. 461.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL, AND MR. JUSTICE KUNHI RAMAN.

Mappillaisami Thevar and others .. *Petitioners**.

v.

Muthuswami Iyer .. *Respondent.*

Criminal Procedure Code (V of 1898), *sections* 200 *and* 537*—Complaint disclosing warrant case against some accused and summons case against others—Procedure to be adopted—Complainant absent and accused discharged —Jurisdiction of Magistrate to set aside the order of discharge—Course open to Magistrate—Fresh complaint—Fresh sworn statement—Necessity—Failure to take fresh sworn statement—Irregularity—If can be cured under section* 537.

Where the allegations in a complaint disclose a warrant case against some accused and a summons case against others, the offences being committed during the course of the same transaction, the proper procedure to be adopted is that laid down for a warrant case.

Where a Magistrate has discharged the accused, he has no jurisdiction to set aside his order of discharge ; his only course is to take fresh cognizance of the case on a proper complaint. But that does not mean that the same complaint upon which the Magistrate originally took cognizance cannot be extracted from the old file and used as a foundation for the new trial.

Ponnammal v. *Salaxi Ammal*, 1933 M.W.N. (Crl.) 233 and *Sait Sogmal* v. *Simhachalam*, 1936 M.W.N. (Crl.) 148, referred to.

Section 200 of the Criminal Procedure Code does not actually say that the Magistrate must examine the complainant with regard to the facts alleged in the complaint, but the clear object of the section would be frustrated unless the examination had reference to the facts leading up to the offence alleged in the complaint. But, where the Magistrate had already satisfied himself that there was some substance in the complaint which justified his taking the case on file and proceeding with the trial, his failure to record a fresh sworn statement after taking the same case again on file is a very minor irregularity that can be cured by section 537 of the Code especially when the objection is not taken in the trial Court and is taken for the first time in revision in the High Court.

Venkatasubba Iyer v. *Soundararaja Iyengar*, 1929 M.W.N. (Crl.) 5 followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional District Magistrate, Ramnad, at Madura, dated 30th April, 1947, in C.A. No. 13 of 1947, preferred against the order of the Court of the Stationary Sub-Magistrate of Ramnad in C.C. No. 847 of 1947.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Petitioners.

S. Krishnamurthi and *V. P. Sarathi* for Respondent.

Assistant Public Prosecutor (*A. S. Sivakaminathan*), for Crown.

On an order of reference to a Bench dated 19th December, 1947, by *Govinda Menon, J.*, this petition coming on for hearing, the Court delivered the following judgment :—

Horwill, J.—This case has been referred to us by Govinda Menon, J., because there appeared to be a conflict between the decision of Burn, J., in *Ponnammal* v. *Salaxi Ammal*[1], and that of Jackson, J., in *Venkatasubba Iyer* v. *Soundararaja Iyengar*[2].

The respondent filed a complaint before the Stationary Sub-Magistrate of Ramnad against three persons. The allegations against the first accused constituted an offence under section 355, Indian Penal Code, which is a warrant case, since the offence is punishable with two years rigorous imprisonment. Against the second and third accused, the offence alleged was one punishable under section 352, Indian Penal Code, which is a summons case, being punishable with only three months' imprisonment. These offences were committed by the three accused during the course of the same transaction. It is clear that under the circumstances the procedure to be adopted is that laid down for a warrant case ; because otherwise

* Cr.R.C. No. 883 of 1947. 19th January, 1948.
(Crl R.P. No. 773 of 1947).

1. 1933 M.W.N. (Crl.) 233.
2. 1929 M.W.N. (Crl.) 5.

these three accused could not be tried together, for a warrant case clearly cannot be tried by the procedure laid down for summons cases. If any authority was needed for this position, *Raghavalu Naicker* v. *Singaram*[1], may be referred to, where although there was only one accused he was tried for offences punishable for more than six months' rigorous imprisonment and for less than six months' imprisonment respectively, committed in the course of the same transaction.

At the second hearing, before any witnesses had been examined, the complainant arrived late. When the case was called at the early part of the day, at 11-30 A.M., the complainant was absent. The Sub-Magistrate thereupon passed an order under section 259 of the Criminal Procedure Code, discharging the accused. The complainant later appeared and said that he had been inadvertently delayed and asked the Magistrate to again inquire into the matter. The Magistrate examined the complainant and found that he had had good cause for his absence, and passed the order :

> " Take the case on file under section 355, Indian Penal Code against the first accused and under section 352, Indian Penal Code against accused 2 and accused 3."

He gave the case a fresh number. He proceeded with the trial and all the three accused were fined. The matter was taken in appeal ; and the appeal was dismissed. The complainant thereupon filed a revision case in this Court, alleging that the trial was vitiated by an illegality, to wit, that the Magistrate had no jurisdiction to try the case in the absence of a fresh complaint after discharging the accused. This objection was taken in this Court for the first time.

It is undoubtedly true, as Burn, J., and King, J., said in *Ponnammal* v. *Salaxi Ammal*[2], and *Sait Sogmal* v. *Simhachalam*[3], respectively, that a Magistrate who has discharged the accused has no jurisdiction to set aside his order of discharge. The only course is to take fresh cognizance of the case on a proper complaint. That does not, however, in our opinion mean that the same complaint upon which the Magistrate originally took cognizance cannot be extracted from the old file and used as a foundation for the new trial. To require a complainant to make a copy of the old complaint or draft a new one, so that it can be said that an independent complaint has been filed seems to us quite unnecessary. The decisions just referred to, and on which reliance was placed by the accused in this connection, do not justify such a contention. The only irregularity in this case, so far as we can see, is that the Magistrate did not strictly comply with the provisions of section 200, Criminal Procedure Code, and examine the complainant upon oath. It is true that section 200 does not actually say that the Magistrate must examine the complainant with regard to the facts alleged in the complaint ; but the clear object of section 200 would be frustrated unless the examination had reference to the facts leading up to the offence alleged in the complaint. The Magistrate, as already said, contented himself with ascertaining whether the complainant had justifiable reason for not appearing in Court at the hour at which the case had been posted. The failure of the Magistrate to record a fresh sworn statement seems to us, however, to be a very minor irregularity. The Magistrate had already satisfied himself that there was some substance in the complaint, which justified his taking the case on file and proceeding with the trial ; and so except for a technical compliance with the law, there was no purpose in again examining the complainant. A similar case came before Jackson, J., in *Venkatasubba Iyer* v. *Soundararaja Iyengar*[4], where the learned Judge pointed out that the " only irregularity lay in his (the Magistrate's) failing to take a sworn statement." " I cannot see " the learned Judge added, " that accused was prejudiced by this irregularity." In that case, too, the old complaint was taken as the basis for the new trial. We agree with Jackson, J., that the failure of the Sub-Magistrate to take a fresh sworn statement was a minor irregularity that can be cured by section 537, Criminal

1. (1918) 34 M.L.J. 369 : I.L.R. 41 Mad. 727.
2. 1933 M.W.N. (Crl.) 233.
3. 1936 M.W.N. (Crl.) 148.
4. 1929 M.W.N. (Crl.) 5.

Procedure Code, since it has led to no failure of justice. In the explanation to section 537, it is said that :

> "In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

As already stated no objection was taken until the revision case was filed in this Court. The revision case is dismissed.

V.P.S. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL, AND MR. JUSTICE GOVINDARAJACHARI.

The National Sewing Thread Co., Ltd., carrying on business in Chidambaram .. *Appellant**.

v.

Messrs. James Chadwick and Bros., Ltd., a company registered under the English Companies Act by its duly constituted Attorney, Harvy Godfrey, Bombay. .. *Respondent.*

Passing off—Ingredients of action—Likelihood of deception of purchaser exercising ordinary caution—Necessity—Figure of a bird and word "Eagley" on plaintiff's sewing thread and "Vulture" on defendant's goods—If likely to deceive purchasers.

In a suit by the plaintiff (whose sewing thread described as "Eagley" brand with its distinctive label had become associated in the Indian Market with sewing thread made by the plaintiff) for passing off against the defendants who on complaint had substituted the word "Vulture" for "Eagle", in respect of their goods,

Held : On the evidence there being no such resemblance in the name and label of the defendant's goods as to render reasonably likely or probable that customers intending to buy the plaintiff's thread would be so confused and deceived as to mistake the defendant's article for the plaintiff's, the suit must be dismissed.

Test of infringement and nature of evidence required in such cases elaborately discussed.

Appeal against the decree of the District Court of South Arcot dated 16th November, 1945, in O.S. No. 13 of 1944.

The Advocate-General (*K. Rajah Aiyar*) and *K. Srinivasan* for Appellant.

O. T. G. Nambiar instructed by *Messrs. King and Partridge* for Respondent.

The judgment of the Court was delivered by

Govindarajachari, J.—This is an appeal in a passing off action in the Court of the District Judge of South Arcot. The defendant company against which a decree granting an injunction, ordering an account, and directing the delivery of the offending labels has been passed is the appellant.

The respondent which is a company registered under the English Companies Act suing by its attorney alleged that it had been for a considerable number of years manufacturing and selling throughout India a sewing thread named "Eagley" with a distinctive label containing the figure of a bird, that the said device and name had become associated in the minds of the public and the traders with sewing thread made by the plaintiff and that the defendant put on the market for sale sewing thread with a label bearing the representation of a bird and the name "Eagle brand" and that such use is calculated to deceive the trade and the public into the belief that when purchasing the defendant's goods they are purchasing the manufacture of the plaintiff. The defendant denied knowledge of the manufacture by the plaintiff of sewing thread using the label in question and stated that when informed of it by the plaintiff in November, 1942, the defendant, to avoid any complaint, substituted the word "vulture" for the word "eagle" and that the differences

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* Appeal No. 630 of 1945. 9 th December, 1947.

between the plaintiff's label and the defendant's label are so many and so large that no " ordinary and reasonable trader" could be deceived " into mistaking the defendant's label for the plaintiff's label." The defendant denied that the plaintiff had any cause of action or was entitled to any injunction, account or damages.

On issue No. 1 the Court below has found that the plaintiff has acquired a right to the exclusive use throughout India of the label marked " A " and the name " Eagley " in connection with sewing thread and on issues Nos. 3 and 6 that the defendant's label is a colourable imitation of the plaintiff's label and trade name calculated to deceive " any ordinary or reasonable trader or member of the public into mistaking defendant's thread for plaintiff's." On issue No. 2, however, the learned District Judge has held that D.W. 1, the managing director of the defendant company did not himself know about the existence of the plaintiff's trade mark, but added that this conclusion did not exclude the likelihood that the artist who designed the defendant's label had seen the plaintiff's label. On issue No. 7 it has been held that there is no evidence to show that the defendant company has itself sold or passed off its goods as those manufactured by the plaintiff. The findings on issues 2 and 7 have not been traversed in the appeal. The appellant challenges the correctness of the findings on issues 1, 3 and 6.

There is a reference in both the plaint and the written statement to certain applications made by the plaintiff and the defendant for the registration of their respective trade marks under the Trade Marks Act (Act V of 1940). It is however admitted that the case falls to be decided without reference to the provisions of that Act and merely on the basis that one party alleges and the other denies that there is passing off of goods, a right of action which is expressly saved by sub-section (2) of section 20 of Act V of 1940.

There has been considerable citation before us by the learned Counsel appearing on either side as to the points arising for determination in a passing off case. While it cannot be denied that on some points there was, at any rate in the past, some difference of opinion and while differences are also noticeable in the relative emphasis laid on the several considerations relevant in a case of this kind which is perhaps inevitable when different Judges deal with varying facts and express their conclusions each in his own words, it seems to us nevertheless that the principles which should govern the decision of cases of this description are now fairly well established and can be briefly stated.

The general principle which was founded on justice and equity is nowhere better expressed than in the following passage in *Singer Manufacturing Co.* v. *Loog*[1], which has become classic.

> "No man" said James, L.J., in that case "is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer."

In his speech in *Leather Cloth Co., Ltd.,* v. *American Leather Cloth Co., Ltd.,*[2] Lord Cranworth observed that,

> " the gist of the complaint in all these cases is, that the defendants, by placing the plaintiffs' trade mark " or it may perhaps be added a colourable imitation of it " on goods not manufactured by the plaintiffs, has induced persons to purchase them, relying on the trade mark as proving them to be of the plaintiffs' manufacture." "This necessarily supposes" he adeed "some familiarity with the trade mark "

To state the position completely it may also be mentioned that a plaintiff need not wait till the defendant's goods are purchased as his, but may maintain a *quia timet* action for the infringement of a trade mark but must in such a case make out a strong case to justify the conclusion that confusion would result from the appearance of

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1. (1879) 18 Ch.D. 395.

2. (1865) 11 H.L.C. (Clark) 523; 11 E.R. 1435.

the defendant's goods in the market (see *Malayan Tobacco Distributors, Ltd.* v. *United Kingdom Tobacco Co.* (1929), *Ltd.*[1]

The plaintiff who alleges a passing off must first establish that the public has grown accustomed to associate the particular name and label with him as the manufacturer or dealer in the article (*Mohamed Esuf* v. *Rajaratnam Pillai*).[2] There must be such an association between the number or the name or the label and the plaintiff as to indicate an understanding of the public that the goods bearing that number, name or label came from the plaintiff (see *Barlow* v. *Govindram*).[3] Shepherd, J., observed in *Ebrahim Currim* v. *Essa Abba Sait*[4],

"that a man can be said to have property in a trade mark only in a peculiar or a qualified sense because in order to establish an infringement he must prove the possibility of other persons being deceived."

The view was at one time expressed that a person who is deceived or is likely to be deceived may be a "thoughtless" or an "incautious purchaser." Lord Kingsdown in *Leather Cloth Co., Ltd.* v. *American Leather Cloth Co., Ltd.*,[5], poses the question for determination as whether the trade mark used by the defendant is calculated "to mislead incautious purchasers." The same expression is used by Lord Blackburn in *Johnston* v. *Orr Ewing*[6]. In the same case at page 226 after referring to one class of customers Lord Selbourne, L.C., goes on to refer to "the more ignorant class of consumers" apparently describing them relatively to the other class which he previously dealt with. Similarly in *Juggi Lal Kamalapat* v. *Swadeshi Mills Co., Ltd.*,[7], Viscount Dunedin after stating that "a person of such literacy as to have critical powers ot observation would not be confused with the defendant's trade-mark" proceeds to observe that the trade-mark "would be apt to be confused by the illiterate and unobservant." In *Payton & Co.* v. *Snelling Lamard & Co., Ltd.*,[8], however, Romer, L.J., observed in the following manner in a well-known passage :

"It seems to be a sort of popular notion of some witnesses that in considering whether the customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods on the market so far as relates to general characteristics. The customer must be one who, knowing what is fairly common to the trade, knows of the plaintiff's goods by reason of these distinguishing characteristics. If he does not know that he is not a customer, whose views can properly or will be regarded by this Court."

In *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain*[9], the Privy Council pointed out that the test is whether a person exercising ordinary caution is likely to be deceived and not whether some ignorant and indiscriminating persons might not be deceived. In *Leather Cloth Co., Ltd.*, v. *American Leather Cloth Co. Ltd.*,[5], Lord Cranworth stated that

"no general rule can be laid down as to what is or is not a mere colourable variation. All that can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser who exercises ordinary caution."

The prevalent and in our opinion, the correct view is, therefore, that the resemblance must be such as to induce an average man exercising ordinary caution to suppose that in buying the defendant's goods he is buying what has been manufactured by the plaintiff.

It is again well settled that it is not enough for the plaintiff to show a mere possibility of deception. He must establish that there is a reasonable probability of purchasers being deceived [*Barloo* v. *Govindram*[10], *Thomas Bear & Sons (India)*,

1. (1933) 66 M.L.J. 588 (P.C.).
2. (1909) I.L.R. 33 Mad. 402.
3. (1897) I.L.R. 24 Cal. 364.
4. (1900) 24 Mad. 163.
5. (1865) 11 H.L.C. (Clark) 523 : 11 E.R. 1435.
6. (1882) 7 A.C. 219.
7. (1928) 56 M.L.J. 282 : L.R. 56 I.A. 1 : I.L.R. 51 All. 182 (P.C.).
8. (1899) 17 R.P.C. 48.
9. (1940) 2 M.L.J. 151 : L.R. 67 I.A. 212 : I.L.R. (1940) All. 446. (P.C.).
10. (1897) I.L.R. 24 Cal. 364.

Ltd., v. *Prayag Narain*[1], *Malayan Tobacco Distributors, Ltd.* v. *The United Kingdom Tobacco Co.* (1929) *Ltd.*,[2]. This is expressed in slightly different language in *Board & Son* (*Incorporated*) v. *Bagors Hutton & Co., Ltd*,[3], (a case of registration of a trade mark) a judgment of the House of Lords confirming the judgment of the Court of Appeal in *Bagots Hutton & Co.'s Trade-mark* In re[4]. It is there said that it must be proved that the defendant's mark is calculated to deceive and that a bare possibility of deception will not do.

It cannot be denied that deception may be by sound as well as by sight (see *Johnston* v. *Orr Ewing*[5], and *Juggi Lal Kamalapat* v. *Swadeshi Mills Co., Ltd.*,[6].

It was at one time held that the opinion of persons more or less conversant with the trade can be given for proving the likelihood of deception (see *Johnston* v. *Orr Ewing*[5]). But the better view and the view which is binding on us is that expressed in *Thomas Bear & Sons* (*India*), *Ltd.* v. *Prayag Narain*[1] as follows :

> "There is no such person as an expert in human nature, and it is now well settled that a witness cannot be called to say that it is likely that purchasers of the goods will be deceived. This can only be a matter of opinion formed after the dispute has arisen and too often without any judicial consideration of the opposing contentions. On the other hand a person who is accustomed to buy the articles in question may be called to say that he would himself be deceived, and cross-examination will often show what weight should be attached to such a statement."

While on the one hand it would be a mistake to suppose that the resemblance must be such as would deceive persons who would see the two marks side by side (see *Seixo* v. *Provesende*[7]) ; it must, on the other hand, be remembered that the customer to whose views the Court will have regard must be one who had some familiarity with the plaintiff's trade-mark and who knows the distinguishing characteristic of the plaintiff's goods.

The evidence in this case is mostly oral. The documentary evidence consists partly of the correspondence which passed between the plaintiff's agents in India, the Central Agency, Ltd., and the defendant between November, 1942 and March, 1943, the former asserting that the name and label used by the latter are likely to result in passing off the defendant's goods as the plaintiff's and the defendant denying that they had or would have that effect. The rest of the documentary evidence consists of orders for the plaintiff's products to which we shall refer in dealing with the oral evidence. The plaintiff examined seven witnesses in Court and five witnesses on commission at Bombay. The defendant's sole witness is its Managing Director, Robert Anderson, the first witness for the plaintiff who has been working as an assistant for 23 years in several branches of the Central Agency, Ltd., deposes that the trade-mark "Eagley" is one of the favoured trade-marks of James Chadwick & Co., that "Eagley" thread has been marketed in India since 1896, that it is found throughout India and that to the purchaser it signifies a product of James Chadwick & Co. He further deposes that except the defendant nobody else to his knowledge has sold the sewing thread with the name "Eagle" or with the figure of a bird. He also states that the plaintiff's thread is made up in reels or clubs, in cops or cones in varying lengths, but adds that the standard length of "Eagley" sold in reels is 5,000 yards, that at present they are selling in cones and that he has no record here to show that they sold in reels. Judging, however, from the orders which have been placed on record and from the other oral evidence in the case it would appear that for a considerable number of years the plaintiff's "Eagley" thread is being sold only in cones of 10,000 yards or 5,000 yards. P.W. 1 states in cross-examination that the plaintiff's thread can be used for any purpose and not merely for the making of banians. The evidence of the five Bombay witnesses is almost identical in terms and it is quite enough to take Gulamal Sadakali Unwala's evidence as typical. He states that his firm deals in sewing thread imported by the Central Agency. He identifies the plaintiff's "Eagley" mark and says that he knows that the goods bearing the "Eagley" mark are

1. (1940) 2 M.L.J. 151 : L.R. 67 I.A. 212 : I.L.R. (1840) All. 446 (P.C.).
2. (1933) 66 M.L.J. 588 (P.C.).
3. (1916) 2 A.C. 382.
4. (1916) 2 Ch. 103.
5. (1882) 7 A.C. 219.
6. (1928) 56 M.L.J. 282 : L.R. 56 I.A. 1 : I.L.R. 51 All. 182 (P.C.)
7. (1866) 1 Ch.A. 192.

manufactured by Chadwick in England, that there is a great demand for " Eagley " sewing thread and that both the wholesale and retail purchasers ask for this thread as " Eagley " cone. When Exs. D and F are shown to the witness as the reels sold by the defendant he says that it would be possible to pass off the goods bearing those marks as those of the plaintiff. In his opinion it makes no difference whether the thread is sold in reels or cones or otherwise. It is elicited in cross-examination that there is no resemblance between the plaintiff's thread and the defendant's, though in the opinion of the witness there is a great resemblance between the plaintiff's " Eagley " mark and the defendant's mark. It is unnecessary to refer to the evidence of the other witnesses examined in Bombay, some of whom are more emphatic than Sadakali Unwala to the extent of stating that in their opinion anyone seeing the mark on the defendant's goods would think that they have been manufactured by the same people who had manufactured the plaintiff's sewing thread. Mr. O. T. G. Nambiar, counsel for the respondent, has conceded, in our opinion, rightly that he cannot rely upon the last portion of the evidence in view of the decision in *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain*[1], to which we have already referred.

There can be no doubt that the plaintiff's " Eagley " thread has established a considerable reputation in this country and that for some decades it has been commanding a wide sale in the Indian markets. It must also be held on the evidence that has been adduced that the thread with the name " Eagley " and the labels used by the plaintiff are associated in the minds of customers with Chadwick & Co.

It has been argued by the learned Advocate-General for the appellant that the market for the plaintiff's thread is different from the market for the defendant's. This has not been established. From the evidence of the Bombay witnesses and that of P.Ws. 1 to 6 it is clear that the plaintiff's " Eagley " thread is put to a variety of uses, for knitting banians, for making ladies' clothes, for stitching and so on. Rajagopala Reddiar, the managing director of the defendant company who has been examined as D.W. 1, deposes that the defendant's thread is used for stitching clothes and not for banians. While it may be that much larger quantities of the plaintiff's " Eagley " thread are used for hosiery, there can be no doubt that the markets for the two goods overlap and that both the threads can be used for stitching purposes.

It has next been argued by the learned Advocate-General that the plaintiff has not established that there is a reasonable probability of deception of customers by the use by the defendant-company of the words " Vulture brand ", together with the labels wound round the reels manufactured by them. It is pointed out that the defendant applied for the registration of the trade-mark " Eagle brand " to the Registrar of Assurances, Calcutta, as early as 25th January, 1940, that in the following February they published a notification in the " *Hindu* " that they are the owners and sole proprietors of that trade-mark and that in deference to an objection taken by the Central Agency, Ltd., the defendant company changed the name of the trade-mark from " Eagle " to " Vulture " in December, 1942. The dissimilarities between the two labels are also pointed out. There can be no doubt that the labels used by the plaintiff and the defendant have several points of difference. The plaintiff's label is circular while the defendant's is rectangular. The former is in colour litho print while the latter is printed in ordinary black. The defendant company's name is also displayed in their label. There is a difference also in the appearance of the two birds. It is not possible to accept the defendant's suggestion that the figure in his label represents a " vulture " as it is admitted that the same figure was used even when the defendant described his trade-mark as " Eagle " brand and though the name was subsequently changed from " Eagle brand " to " Vulture brand " the figure was retained without any alteration. The plaintiff's label is printed on neat white paper while the defendant's is printed on brown paper. The plaintiff's thread is sold in Indian markets only

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1. (1940) 2 M.L.J. 151 ; L.R. 67 I.A. 212 : I.L.R. (1940) All. 446 (P.C.).

in cones of 10,000 or 5,000 yards. The defendant's thread is sold in cylinders with varying lengths but never exceeding 1,000 yards. While, as stated, it must be taken that there is a market in which both the plaintiff's and the defendant's thread are offered for sale, it cannot at the same time be overlooked that there is considerable disparity in prices. Venkatesa Iyer (P.W. 3) who is an employee of Messrs. S. Doraiswami Mudaliar & Sons, Madras, a firm dealing in both threads, states that the plaintiff's thread costs 2 or 3 times as much as that of the defendant. No doubt a plaintiff's grievance in a passing off action very often is that the defendant is selling cheaper goods passing them off as the plaintiff's; but if the disparity of prices is so large as to make the customer pause and think whether he is buying the plaintiff's goods at all, it seems to us that this circumstance cannot be ignored in deciding whether there is a reasonable probability of deception. It is unnecessary to refer to the letter press on the labels which is of course different but to which much importance need not be attached, as the customer is not expected to place the two labels side by side and make a comparison of their appearance or their contents, the test in all these cases being whether the general impression left in the mind of a customer who had previously bought the plaintiff's goods is such that he is likely to acept the defendant's goods when they are offered to him in the belief that they are the plaintiff's. When we speak of a label we are not of course confining ourselves to the visible representations of the trade-marks of the two parties. When the plaintiff's goods are sold by a certain name and under a certain label the cumulative effect of what is seen and what is heard provides the criterion. Mr. O.T.G. Nambiar, learned counsel for the respondent, has argued that the most distinctive part of the plaintiff's label is the figure of a bird and that the customer is likely to remember only that figure and the word "Eagley" and that having regard to the fact that the defendant's label also contains the figure of an eagle and the defendant's goods are sold as "Vulture brand," there is every chance of the purchasers taking the defendant's goods for the plaintiff's.

It is necessary now to examine the evidence in the light of the respective contentions. It must first be pointed out that the Bombay witnesses and P.Ws. 1, 2, 4, 5 and 6 have always dealt only with the plaintiff's goods and never with the defendants. P.Ws. 7 and 8 have similarly handled only the defendant's goods and have never handled the plaintiff's. The only witness whose firm has been trading in both the plaintiff's and the defendant's goods is P.W. 3 and in our opinion therefore considerable importance attaches to the evidence of this witness.

Dealing with the several classes of purchasers of the plaintiff's goods it cannot be denied that the wholesale and retail dealers of the status of the Bombay witnesses cannot be deceived by the supply of the defendant's goods when they ask for the plaintiff's, nor can it be maintained that buyers like the Common Wealth Trust, Ltd. or Madura Knitting Co., or Sri Krishna Rajendra Mills, Ltd., who require the plaintiff's goods for their own manufactures can possibly be the victims of any deception.

As regards tailors buying the sewing thread for their shops or householders buying it for their domestic needs a distinction must necessarily be made between those who are acquainted with the English language and those who are not. It would be difficult to suppose that the former class would accept the defendant's goods as the plaintiff's. Though the defendant started in 1940 calling his goods "Eagle brand" we must for the purpose of this case proceed upon the footing that since 1942, he has been describing them as "Vulture brand". The statement in the evidence of P.W. 7 that "after the defendant changed the name from 'Eagle' to 'vulture' the English knowing customers would ask for 'Vulture mark" must be accepted as correct.

The evidence as to the residuary class of individual buyers unacquainted with the English language is far from being definite. P.W. 2 is a travelling representative of the Central Agency, Ltd., who, as already stated, handle the goods produced by Chadwick & Co., in India. His mother-tongue is Tamil. He admits that no order, whereby he means a written order, has been placed, with the Central

Agency in Tamil. The orders are always taken in English. He says that when the orders are oral the Tamil customers ask for the " Kazhugu " mark. He is unable to give the Tamil equivalent of "Vulture" ; but it may be assumed that the word " Kazhugu " is the Tamil equivalent for the English words " Eagle " and " Vulture ". (*See* Tamil Lexicon published by the University of Madras). In answer to a question by Court, P.W. 2 states that in Telugu districts people call it " Pakshi mark or Garuda mark ". P.Ws. 7 and 8 are witnesses from Guntur and Kistna districts. P.W. 7 states that those unacquainted with English call the defendant's goods " Gadda " or " Garuda ", that they are sold under the name of " Pakshi mark " or " Garuda mark " and that notwithstanding the change of the English name for the defendant's goods from " Eagle brand " to "Vulture brand ", those who do not know English still call them " Garuda " mark. P.W. 8 does not refer to the Telugu equivalents of the word "Eagle" or "Vulture". His evidence does not impress us as sufficiently definite or accurate. His statement for instance that his firm continues to sell the defendant's goods to the consumers under the name " Eagle " even after the defendant altered the name to " Vulture " cannot be accepted if he is referring to purchasers who know English. The evidence of P.W. 7 with regard to this class of customers seems more probable. Customers who know English would not only find the words " Vulture brand " on the defendant's label, but would also notice that the manufacturers are the defendant company. P.W. 8 qualifies in cross-examination what he has stated in chief examination and admits that after the name " Eagle " was changed into " Vulture " his firm ordered goods with the " Vulture mark " and was so supplied.

The evidence of P.W. 3 is much more important and reliable. He is the only witness who had occasion to buy and sell the plaintiff's goods and the defendant's. In his examination in chief he states that if a customer came to his firm and asked for " Eagle " thread they would first show the cheaper variety in the defendant's article. If the customer wanted a superior quality then they would show the plaintiff's thread. In his cross-examination he says that the defendant's goods are inferior in quality and are being used for stitching shirts, coats, etc., while the plaintiff's goods are being used for making hosiery ; but he adds that if one cannot be had, the other thread can be used. The customers would come and ask for " Pakshi nule " and the witness's firm would first offer the defendant's products. If they asked for a superior kind, they would then show the plaintiff's goods. The witness refers to a difference in the posture of the birds in the two designs. It is true that there is some difference, but no importance need be attached to this as a purchaser cannot be expected to make a detailed comparison of the two labels before buying. The most significant part however of the evidence of P.W. 3 consists in his answer that, " If a purchaser had once bought the plaintiff's goods he would know the difference at once if the defendant's goods are offered." This seems to us to put the whole case in a nutshell. If the true test is as has been laid down in the cases how a person who once bought the plaintiff's goods would re-act when the defendant's goods are offered to him ; the witness states definitely that he would at once notice the difference. Mr. Nambiar relies on a statement occurring in the cross-examination of P.W. 8, " We can dispose of the defendant's goods only with the name ' Eagle '. The customers like and ask for " Eagle " and we supplied the defendant's goods and the customers got off". We have already had occasion to refer to the evidence of this witness as somewhat unconvincing. The witness does not differentiate between those who are acquainted with the English language and those who are unacquainted with it. In fact he does not speak of the latter class at all and as regards the former class his evidence cannot easily be accepted, particularly in view of the evidence of P.W. 7 which sounds true that English knowing customers would ask for " Vulture mark ". The evidence of P.W. 3, that the difference in the quality of the two threads is so marked, that customers ask for a superior article after the defendant's thread is shown to them also reveals that the one cannot easily be mistaken for the other. P.W. 3's evidence does not show that his firm ever thought they would be guilty of deception if they offered the defendant's goods when asked for " Eagle brand ". Evidently they

were under the impression that the defendant's thread is not likely to be assumed to be the plaintiff's and having regard to the relative prices and qualities the two threads were apparently treated as being in different classes.

On the whole we have come to the conclusion that the evidence offered on behalf of the plaintiff is very meagre and that the plaintiff has not succeeded in making out that there is any probability of a purchaser exercising ordinary caution being confused or deceived into buying the defendant's goods under the impression that they are the plaintiff's.

One more observation has to be made. We cannot accept what Mr. Nambiar seemed to suggest at one stage in the course of his argument that we should have regard only to the name " Eagle " and not to the label. In the first place in paragraph 5 of the plaint, it is stated that

" the said device or trade mark and the name ' Eagley ' have become associated in the minds of the public and the traders and merchants with sewing thread made and sold by and as the merchandise of the plaintiff ".

The case itself proceeded on the footing that the label also plays an important part. This is apparent from the evidence of the Bombay witnesses who describe the design of the label and who also offer their opinion that the mark on the defendant's goods is such as to make the purchasers mistake them for the plaintiff's goods. As has been pointed out, in *Barlow* v. *Gobindram*[1], where numbers were used in conjunction with striking object designs and in *Mohamed Noordin* v. *Abdul Kareem & Co.*[2], where a name was used along with a picture, if the plaintiff claims that the goods are dealt with by the number alone or by the name alone divorced from the design or the picture, it is for him to make it out and in the absence of evidence that the design or picture is of no consequence, the legitimate inference should be that it played an important part along with the number or the name as the case may be. It seems to us that having regard to the pleadings in the case and also to the probabilities in cases of this kind the cumulative effect of the name and the figure falls to be decided.

We hold agreeing with the learned District Judge in this regard that the goods described as " Eagle brand " with the distinctive label used by the plaintiff company have become associated in the Indian market with Chadwick Co. ; but we are unable to accept the conclusion of the learned District Judge that there is such a resemblance in the name and label of the defendant's goods as to render reasonably likely or probable that customers intending to buy the plaintiff's thread would be so confused and deceived as to mistake the defendant's article for the plaintiff's. The question is one of fact on which evidence is essential and bearing in mind the guidance that is afforded by the several decisions to which reference has already been made we have come to the conclusion that the plaintiff has failed to make out his case as to the second and essential ingredient in a passing off action, *viz.*, likelihood of deception of a purchaser exercising ordinary caution.

In the result we allow the appeal and dismiss the plaintiff's suit with costs throughout.

K.S. ——— *Appeal allowed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Pedda Iswara Reddy .. *Petitioner*.*

Provincial Insolvency Act (V of 1920), *sections* 5 *and* 75—*Right of appeal—Test—" A decision come to or an order made "—What would amount to—Order granting application under Order* 1, *rule* 10, *Civil Procedure Code, to add alienees from insolvent as parties to insolvency application—Appeal to District Court—Competency.*

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1. (1897) I.L.R. 24 Cal. 364.
2. 48 R.P.C. 491.

* S.R. Nos. 22,769 and 22,771 of 1947. (C.R.P. sought to be presented). 17th February, 1948.

Section 5 of the Provincial Insolvency Act cannot override the provisions of section 75 of the same Act in so far as the latter section confers a right of appeal in any instance. It is not permissible to read the provisions of section 75 with a further modification that the provisions are subject to the provisions of the Civil Procedure Code.

An order which finally decides a point of controversy between the parties would fall within the words " a decision come to or order made " which occur in section 75 (1) of the Provincial Insolvency Act.

Against orders granting an application made under Order 1, rule 10, Civil Procedure Code, praying that certain alienees from the insolvent may be added as party respondents in an insolvency application and that the delay in filing such an application may be excused, two revision petitions were sought to be filed in the High Court on the ground that as they were not appealable under Order 43, Civil Procedure Code, appeals to the District Court were incompetent. On a question as to the competency of the revisions to the High Court,

Held: The only question to be decided was whether the orders in question were orders made or decisions come to by the judge in the exercise of insolvency jurisdiction. They are such orders and they definitely conclude a particular dispute between the parties, namely, whether the alienees were to be made parties or not and fall within the words " a decision come to or an order made " within the meaning of section 75 (1) of the Provincial Insolvency Act. Revisions against those orders to the High Court would be incompetent inasmuch as appeals lie to the District Court.

Petition under section 75 of Act V of 1920 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Kurnool, dated 5th February, 1947, in M.P. Nos. 20 and 21 of 1947 respectively in I.P. No. 8 of 1946.

P. Chandra Reddi for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

(On an order of reference to a Bench by Govinda Menon, J., dated 20th January, 1948, this petition coming on for hearing, the Court made the following)

ORDER : *The Officiating Chief Justice.*—The question for decision is whether appeals lie to the District Court of Kurnool from two orders made by the Subordinate Judge of Kurnool, *viz.*, an order granting an application made under Order 1, rule 10, Civil Procedure Code, praying that certain alienees from the insolvent may be added as party respondents to an insolvency application, and an order excusing delay in filing the former application. Two revision petitions have been filed in this Court against the said two orders, and they will be incompetent if appeals lie to the District Court.

These two orders were passed by the learned Subordinate Judge in the course of an insolvency application. They must therefore be deemed to have been passed in the exercise of insolvency jurisdiction. Section 75 of the Provincial Insolvency Act specifically provides for appeals and revision petitions against orders made in the exercise of insolvency jurisdiction. Under section 75 (1), the debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, may appeal to the District Court, and the order of the District Court upon such appeal shall be final. If the orders in question are orders made or amount to decisions come to in the exercise of insolvency jurisdiction, then certainly appeals lie against them to the District Court.

It was contended by Mr. Chandra Reddi on behalf of the petitioners that section 75 has to be read with section 5 of the Act, which prescribes that the Court, in regard to proceedings under the Act, shall have the same powers and shall follow the same procedure as it respectively has and follows in regard to civil suits. This provision makes, as it were, the entire Code of Civil Procedure, so the argument ran, applicable to the proceedings in insolvency, including the provisions of the Code of Civil Procedure relating to appeals. It follows that unless an order is appealable under Order XLIII of the Civil Procedure Code or any other similar provision an appeal will not lie from a Subordinate Court to a District Court or from a District Court to the High Court under section 75. In the case of the two applications before us, there can be no doubt that treated as orders under the Code of Civil Procedure appeals do not lie under Order XLIII or any other provision

of the Code. We do not, however, agree with this contention. It is not necessary to decide how far section 5 confers revisional jurisdiction on this Court, but in our opinion it is clear that section 5 cannot override the provisions of section 75 in so far as the latter section confers a right of appeal in any instance. It is not permissible to read the provisions of section 75 with a further modification that the provisions are subject to the provisions of the Civil Procedure Code in regard to appeals. The only question, therefore, is whether the orders made by the learned Subordinate Judge of Kurnool are orders made or decisions come to in the exercise of insolvency jurisdiction. If they are, appeals lie to the District Court. Though several decisions were cited before us, both of this Court and other Courts, we have been unable to derive much assistance as to the test to be applied to determine whether a particular order falls within section 75 (1) of the Provincial Insolvency Act. The decision of a Bench of this Court in *Lakshmappa* v. *Venkatareddi*[1] was cited to us, in which it was held that an order merely holding that the Insolvency Court had jurisdiction to entertain an application was not appealable under section 75 of the Provincial Insolvency Act. The learned Judges say that while they are sensible of the difficulty of stating in sufficiently clear-cut and definite terms what is and what is not an order for purposes of section 75 of the Provincial Insolvency Act, they were convinced that the recording of a mere finding that the Court has jurisdiction to entertain an application cannot be deemed to be an order within the meaning of that section. It is not necessary for us to canvass the correctness of this decision on the facts before the learned Judges. But this decision does not directly govern the facts of the present case. Here, we have orders, the result of which is definitely to conclude a particular dispute between the parties, namely, whether the alienees should or should not be made parties to the insolvency application. This matter has been finally decided by the Subordinate Judge. These orders would therefore fall within the words, " a decision come to or an order made " in section 75 (1) of the Provincial Insolvency Act. It has been urged that it will be anomalous to hold that orders which will not be appealable under the Code of Civil Procedure when made in suits should be held to be appealable when made in the exercise of insolvency jurisdiction. That, however, is not a ground which should influence us in construing section 75. It is a matter of common knowledge that though certain orders made by Subordinate Courts are not appealable under the Code of Civil Procedure, similar orders made by a single learned Judge of this Court on the Original Side are appealable under clause 15 of the Letters Patent.

Though it may be difficult to define the words, " a decision come to or an order made " which occur in section 75 (1) of the Provincial Insolvency Act, we consider that an order which finally decides a point of controversy between the parties would fall within the expressions. The orders before us are such orders. We, therefore, hold that appeals could have been filed to the District Court and therefore the civil revision petitions filed in this Court are not competent.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Govindan Nair .. *Appellant**

v.

Nagabhushanammal and another .. *Respondents.*

Partnership Act (IX of 1932), section 6—Constitution of partnership—Essentials—Tea shop and utensils purchased by two persons contributing equally and leasing it out for rent—Division of rent between them—Partnership if constituted.

Where a tea shop was purchased by *A* and *B* and additional expense incurred for purchasing utensils, etc., each contributing a half of the total expense and the shop was leased out on a daily rent which was divided between them both, there is no partnership constituted. *A* and *B* are co-owners only.

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1. (1942) 1 M.L.J. 113.

* City Civil Court Appeal No. 59 of 1946. 17th October, 1947.

Appeal against the decree of the City Civil Court, Madras, dated 1st February, 1946, in O.S. No. 787 of 1946.

K. Sanjeeva Kamath for Appellant.

T. K. Rangaswami for Respondents.

The Court delivered the following

JUDGMENT.—On the facts that emerge in this case it is difficult to sustain the finding of the learned Judge that the plaintiff is a partner with the first defendant in the tea shop and that this suit is cognizable by the City Civil Court. According to the plaintiff, the tea shop was purchased for a sum of Rs. 846-8-0 including the additional expense incurred for purchasing utensils, etc., and that out of this sum the first defendant contributed a half, *i.e.*, Rs. 423-4-0. According to the plaintiff the shop was leased by the plaintiff and the first defendant on a daily rent of Rs. 4-8-0 and the rent was being divided between them both. According to the first defendant, however, he is the exclusive owner of the shop and the plaintiff has no interest in it. The plaint was framed on the footing that the plaintiff and the first defendant are partners each owning a half share in the business and the plaintiff seeks to obtain a decree dissolving the partnership and for accounts. The first defendant raised the objection that the City Civil Court had no jurisdiction to entertain the suit as there was no partnership and the only right of the plaintiff, if she established her right to a half share in the property, was to get an ascertained amount of Rs. 2-4-0 per day being her share of the rent. On these allegations the only question that arises for decision is whether the first defendant is the exclusive owner of the tea shop or whether the plaintiff and the first defendant are joint owners. Even according to the facts as alleged by the plaintiff the relationship constituted by them would not be a partnership. Nothing more is done by the parties than utilising the common property and obtaining a return for such use by leasing the property for rent. The contribution made by the plaintiff and the first defendant towards the price for the acquisition of the property in equal moieties would only make them co-owners and not partners. They never carried on any business but only obtained a return by using the common property. The distinction between part ownership and partnership is no doubt very difficult to define. As pointed out by Lindley on Partnership, 10th edition at page 32,

> "If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result."

At page 33 the learned author observes,

> "Moreover, part owners who divide what is obtained by the use or the employment of the thing owned are not thereby constituted partners. For example, if two tenants in common of a house let it and divide the rent equally between them, they are not partners although they may pay for the repairs out of the rents before dividing it. So two persons who are co-owners of a race horse, and share his winnings on the one hand, and the expenses of his keep on the other, are not partners but co-owners only."

This last illustration in my opinion exactly applies to the facts of the present case. The same distinction is provided by Explanation 1 to section 6 of the Indian Partnership Act, which reads as follows:

> "The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such person partners."

As stated already it is very difficult to apply the definition of partnership contained in section 4 of the Act to the facts of the present case as the plaintiff and the first defendant did not carry on any business in respect of tea shop except leasing the common property for rent. I am therefore of opinion that in this case the essentials that go to constitute the relationship of partnership are wanting and that if the case of the plaintiff is true, she was merely a part owner with the first defendant. In this view of the case, the learned City Civil Judge had no jurisdiction to try the suit. The appeal is therefore allowed and the decree of the lower Court is set aside. The plaint will be returned for presentation to the proper Court. The first defendant undertakes not to draw the money deposited by him in the City

Civil Court for a period of two months from this date and also not to alienate any of the moveable properties of the tea shop. The plaintiff will take immediate steps to present the plaint in the proper Court and obtain the necessary orders, if so advised. The appellant is entitled to costs here and in the Court below.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

Chinniah Thevar .. *Petitioner**

v.

F. M. Badsha .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12 (1) (a) *and Civil Procedure Code (V of* 1908), *section* 115—*Subordinate Judge appointed appellate authority to entertain appeals against orders of the Rent Controller*—Persona designata *and not Court—Revision against his orders under section* 115, *Civil Procedure Code, not competent.*

The language of section 12, Madras Buildings (Lease and Rent Control) Act, 1946, makes it clear that a District Judge or a Subordinate Judge notified as an appellate authority for the purpose of the Act is appointed as a *persona designata* and not as a Court. He is not a Court subordinate to the High Court. Hence no revision could be entertained by the High Court under section 115, Civil Procedure Code, against an order passed on appeal by such an appellate authority.

Abdul Wahid Sahib v. *Abdul Khader Sahib*, (1947) 1 M.L.J. 207, followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tanjore, dated 9th December, 1947, in C.M.A. No. 25 of 1947 preferred against the order dated 4th October, 1947, in H.R.C. No. 106 of 1947, House Rent Controller, Tanjore, etc.

T. N. Sundaresa Aiyar for Petitioner.

V. S. Rangachari for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Subordinate Judge of Tanjore confirming the order of the Rent Controller, Tanjore, evicting the petitioner. By section 12 (1) (*a*) of the Madras Buildings (Lease and Rent Control) Act, 1946, " the Provincial Government may, by general or special order notified in the *Fort St. George Gazette*, confer on such officers and authorities as they think fit, the powers of appellate authorities for the purposes of this Act . . . . . " In exercise of this power the Provincial Government have appointed the District Judges in some places and Subordinate Judges in other places as " appellate authorities". In the Tanjore district the Subordinate Judge has been so appointed.

A preliminary point arises as to whether this Court has jurisdiction to interfere in revision. Clearly such jurisdiction can arise only if the case is one falling within the provisions of section 115 of the Civil Procedure Code. The question then is whether the Subordinate Judge of Tanjore acting as an " appellate authority " under this Act is properly to be regarded as a Court subordinate to the High Court. Counsel for the petitioner has referred me to the following relevant authorities of this Court on this very interesting point: *Abdul Sattar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition*[1], *Parthasarathi Naidu* v. *Kotiswararao*[2], *Ramaswami Goundar* v. *Muthuvelappa Goundar*[3], *Lakshmana Chetti* v. *Kannappar*[4], *Rajah of Venkatagiri* v. *Shaik Mahaboob Saheb*[5] and *Abdul Wahid Sahib* v. *Abdul Khader Sahib*[6]. In view of these authorities I find it impossible to regard the Subordinate Judge

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* C.R.P. No. 1878 of 1947 and C.M.P. No. 7268 of 1947. 20th January, 1948.

1. (1923) 46 M.L.J. 209 : I.L.R. 47 Mad. 357 (F.B.).
2. (1923) 46 M.L.J. 201 : I.L.R. 47 Mad. 369.
3. (1922) 44 M.L.J. 1 : I.L.R. 46 Mad. 536.
4. (1926) 51 M.L.J. 738 : I.L.R. 50 Mad. 121.
5. (1943) 2 M.L.J. 615.
6. (1947) 1 M.L.J. 207.

of Tanjore in this matter as a Court subordinate to the High Court. Had the Subordinate Judge been appointed in the Act as the appellate authority the position might well have been different; for then there would have been an indication of intention on the part of the Legislature to give jurisdiction in such matters to an existing Court. I say "might have been different", because even so, I am inclined to the view that the remaining provisions of section 12 of the Act would negative any such intention, as clause 3 of section 12 directs that in hearing an appeal the appellate authority shall send for the records of the case from the Controller and after giving the parties an opportunity of being heard and, if necessary, after making such further inquiry "as he thinks fit either personally or through the Controller, shall decide the appeal." Thus the appellate authority is entitled to make enquiries himself apart from hearing the parties and to take the results of those enquiries into account in arriving at his decision. This provision is entirely inconsistent with the accepted rules which would govern a Court. Again it is noteworthy that the Act empowers the Provincial Government to confer the power of appellate authorities "on such officers and authorities as they think fit." There is here no indication of intention to leave these matters for consideration by any Civil Court. Any officer or authority could be appointed. In *Abdul Wahid Sahib* v. *Abdul Khader Sahib*[1], my learned brother, Yahya Ali, J., has decided this same point. He came to the conclusion that the language of section 12 makes it clear that a District Judge or Subordinate Judge notified as the appellate authority is appointed as a *persona designata* and not as a Court, and I am in complete agreement with that conclusion.

Accordingly the petition is dismissed with costs. C.M.P. No. 7268 of 1947 is dismissed.

K.C. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Kammala Seshagiri Rao *alias* Prof. Giri Rao .. *Petitioner**

v.

Kammala Somasundaramma (first petitioner) and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 24—Case remanded on appeal by High Court to the Court of the Subordinate Judge which disposed of the suit—Transfer of that suit by District Judge to a different Subordinate Judge's Court—Legality.

On appeal against the dismissal of a suit by the Subordinate Judge of Masulipatam, the High Court set aside the order of dismissal and remanded the suit to the same Court for disposal according to law. When the suit was pending in that Court after remand, the District Court on the application of one of the parties transferred it to the Court of another Subordinate Judge. On a question as to the legality of the order,

Held: That the order of the District Judge was not without jurisdiction. Different considerations may arise if the order of remand on special grounds indicates a particular Judge to try a case or not to try it, but that was not the case before the Court.

Singamusetti Venkatiah v. *Bopalla Chirranna*, (1914) M.W.N. 317 and *Koya Thangal* v. *Ravi Varma*, (1944) 2 M.L.J. 91, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct re-transfer of O.S. No. 65 of 1943 to the file of the Court of the Subordinate Judge, Masulipatam, from the Court of the Subordinate Judge of Bezwada and to direct the retention of the same on the file of the Court of the Subordinate Judge of Masulipatam.

M. Appa Rao for Petitioner.

P. Somasundaram and *C. V. Narasimha Rao* for Respondents.

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1. (1947) 1 M.L.J. 207.

* Civil Miscellaneous Petition No. 4146 of 1947. 11th February, 1948.

(On an order of reference to a Bench by Govinda Menon, J., dated 15th January, 1948, this petition coming on for hearing, the Court made the following)

ORDER : *The Officiating Chief Justice.*—This petition has been posted before a Bench of two Judges because Govinda Menon, J., before whom it came up in the first instance considered that there was a conflict between rulings of this Court.

The first respondent to this petition filed a suit against the petitioner and another originally in the Court of the Subordinate Judge of Bezwada for the recovery of certain moveables or their price. The suit was transferred by the District Judge of Kistna to the Court of the Subordinate Judge of Masulipatam where it was re-numbered as O.S. No. 65 of 1943. The suit was dismissed by the Subordinate Judge of Masulipatam, but on appeal this Court set aside the order of dismissal and remanded the suit for disposal according to law to the lower Court. As the appeal to this Court was from the Court of the Subordinate Judge of Masulipatam, the decree ran that the suit was remanded to the Court of the Subordinate Judge of Masulipatam. When the suit was pending before that Court the plaintiff applied to the District Court to have the suit transferred to the Subordinate Judge's Court at Bezwada and his application was granted. Thereupon the present petition was filed for a re-transfer of the suit to the Court of the Subordinate Judge of Masulipatam.

Mr. Appa Rao, the learned advocate for the petitioner, contends that as this Court by its decree remanded the suit for disposal by the Court of the Subordinate Judge of Masulipatam, the District Judge had no jurisdiction to re-transfer the suit to any other Court. Reliance was placed on a decision of Krishnan, J., in *Uthuman Ammal* v. *Naina Mahomed*[1]. In that case the High Court remanded a case for trial by the District Munsiff's Court of Madura town. Originally the suit was tried by the Court of the First Additional District Munsiff which was later on designated as the District Munsiff's Court of Madura taluk. But as it was represented to the High Court that the Court which tried the suit had ceased to exist, the suit was remanded for trial by the District Munsiff's Court of Madura town. However, by the time the suit went back, the first Additional District Munsiff's Court had been re-established as the Madura Taluk District Munsiff's Court. The District Court on receiving the papers from this Court passed them on to the Madura Taluk District Munsiff's Court. Krishnan, J., upheld an objection to the jurisdiction of that Court to try the case. We entirely agree with the decision of Krishnan, J., on the facts of the case before him. The Madura Taluk Munsiff's Court could have jurisdiction to try the suit after remand, only if it was empowered to do so in one of two ways : (1) by the decree of this Court remanding the suit for disposal by it ; or (2) by an order of the District Court under section 24 of the Civil Procedure Code. The decree of this Court did not empower the Taluk Munsiff's Court to try the case and there was no order of the District Court under section 24 of the Civil Procedure Code transferring the suit to that Court. Govinda Menon, J., after looking into the printed papers in the case reported in *Uthuman Ammal* v. *Naina Mahomed*[1] was inclined to think that there was an order of transfer under section 24 of the Civil Procedure Code made by the District Court. With respect to the learned Judge we think he was wrong. We have also gone through the papers in that case. All that we find is that the papers when they were received by the District Court, were sent by that Court to the Taluk Munsiff's Court (*see* page 4 of the documents paper in C.R.P. No. 876 of 1921). There is no trace of any order by the District Court under section 24 of the Civil Procedure Code transferring the suit to the Taluk Munsiff's Court, which therefore had no jurisdiction to try the case. On the other hand a decision of a Division Bench of this Court in *Singamusetti Venkatiah* v. *Bopalla Chirranna*[2], supports the view that though the decree of the High Court may remand a suit or appeal for disposal by a particular Court, the District Court can exercise the power under section 24 of the Civil

1. (1922) 44 M.L.J. 238. 2. (1914) M.W.N. 317.

Procedure Code and transfer the suit to any other competent Court for disposal. In that case an appeal was remanded by this Court to be heard by the District Court. The District Judge instead of hearing the appeal himself, sent it down to the Subordinate Judge for disposal. The learned Judges, Sadasiva Aiyar and Spencer, JJ., held that the order of Court could be supported by the comprehensive language of section 24 of the Civil Procedure Code under which the District Court's powers of transfer were much wider than under the old law. This decision was followed by Somayya, J., in a case reported in *Koya Thangal* v. *Ravi Varma*[1], where a suit was remanded by the High Court expressly to the District Court for disposal because the Sub-Court which would have had jurisdiction in respect of the suit had been abolished; but by the time the case went back, the Sub-Court was re-established and therefore the District Judge transferred the suit to that Sub-Court The learned Judge upheld the order by relying on section 24 of the Civil Procedure Code as construed by the Division Bench in *Singamusetti Venkatiah* v. *Bopalla Chirranna*[2]. The learned Judge, if we may say so with respect, rightly distinguished the decision in *Uthuman Ammal* v. *Naina Mahomed*[3], on the ground that in that case there was no order of the District Judge under section 24 of the Civil Procedure Code. We follow with respect the decision of the Division Bench in *Singamusetti Venkatiah* v. *Bopalla Chirranna*[2] and the decision of Somayya, J., in *Koya Thangal* v. *Ravi Varma*[1]. In our opinion there is no conflict between these two decisions and the ruling of Krishnan, J., in *Uthuman Ammal* v. *Naina Mahomed*[3]. The order of the District Judge in this case was not without jurisdiction. This disposes of the legal objection which made it necessary for the case to be posted before a Division Bench.

Different considerations may arise if the order of remand on special grounds indicates a particular Judge to try a case or not to try it but that is not the case here.

The petition will be posted for final orders before Govinda Menon, J.

This petition coming on for final disposal (18th February, 1948) before Govinda Menon, J., the Court made the following

ORDER.—In the order referring the case to a Bench, I have already stated that on the merits, I see no reason to differ from the District Judge.

The petition is therefore dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

Pamudurthi Suryanarayana Reddi and others .. *Appellants**

v.

Pamudurthi Venkata Reddi and others .. *Respondents.*

Arbitration Act (X of 1940), *sections* 14, 17 *and* 32—*Award not filed into Court—Decree and judgment no passed thereon—Award fully performed—Subsequent claim on same matter—Reliance on award by way of defence—Permissibility.*

The inhibition in section 32 of the Arbitration Act is confined merely to a plaint by which a decision upon the existence, effect or validity of an award is sought. Its provisions do not extend to a defence as opposed to the filing of a suit. Consequently a defendant is not precluded from putting forward an award which has been fully performed by him but which was not filed under section 14 and according to which a judgment was not pronounced or a decree given under section 17 of the Act, in answer to the plaintiff's claim which was the subject-matter of the reference and the award.

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1. (1944) 2 M.L.J. 91.
2. (1914) M.W.N. 317.
3. (1922) 44 M.L.J. 238.

* Appeal No. 548 of 1945. 21st January, 1948.

Appeal against the decree of the Court of the Subordinate Judge, Anantapur, dated 22nd December, 1944, in O.S. No. 22 of 1944.

K. Subba Rao and *S. Obul Reddi* for Appellants.

P. Somasundaram and *C. Kondiah* for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—The question in this appeal is whether, by reason of the provisions of the Indian Arbitration Act, 1940, a defendant is precluded from putting forward an award which has been fully performed by him but which was not filed under section 14 and according to which a judgment was not pronounced or a decree given under section 17 of the Act, in answer to the plaintiff's claim which was the subject-matter of the reference and the award.

The short facts are as follows:—The plaintiff, the first respondent here, is the son of one Bayappareddy by his first wife. The appellants who were defendants 1 to 4 in the Court below are Bayappareddy's sons by his second wife. The fifth, sixth and seventh defendants are respectively the younger brother, the second wife and the mother of Bayappareddy who died on 14th March, 1942. The plaintiff claimed a partition of the suit properties on the ground that the fifth defendant, his uncle, is entitled to a half share, and the plaintiff and defendants 1 to 4 are entitled to the other half in five equal shares. The plaint mentioned a reference to arbitration made by the plaintiff and defendants 1 to 4 by an agreement, dated 9th December, 1942, which resulted in an award dated 9th March, 1943. The plaintiff however alleged several grounds of invalidity against the award. These were found against by the Court below, and the decision of the lower Court in this respect has not been challenged before us. The plaint went on to state that, notwithstanding the award which had earlier been stated to be invalid, the plaintiff was entitled to a partition decree. The fifth defendant alleged that he and Bayappareddy became divided in 1941 and that he had thereafter no concern with the properties which had been taken by Bayappareddy for himself and his sons. Defendants 1 to 4 supported the fifth defendant in this regard and relied principally on the award in bar of the plaintiff's claim. They had been directed to pay Rs. 19,000 to the plaintiff under the award, on or before 25th April, 1943. On that date the amount was tendered by the first defendant but the plaintiff refused to receive it, and the amount was thereupon deposited in the Anantapur Co-operative Central Bank, due notice of which was given to the plaintiff. The award was also registered.

All these facts were found in favour of the defendants by the Court below. The learned Subordinate Judge however held that the defendants' plea based on the award could not be entertained in view of the provisions of the Arbitration Act. In this view, he proceeded to pass a preliminary decree for a division into five shares of the properties described in Ex. D-4 series and Ex. D-3 and gave certain directions regarding the liabilities of the family, the claims of the sixth and seventh defendants for maintenance and the marriage expenses of an unmarried sister of the plaintiff and defendants 1 to 4.

On behalf of defendants 1 to 4 who are the appellants in this appeal the principal argument is that the Arbitration Act does not prohibit the raising by a defendant of such a plea as has been raised by them in this case. The appellants' counsel, Mr. Subba Rao has referred to *Bhajahari Saha Banikya* v. *Behary Lal Basak*[1] and certain earlier and later decisions to the effect that before the coming into force of the Arbitration Act, 1940, a valid award was operative even though neither party sought to enforce it by a suit or by an application under the appropriate provision in the Code of Civil Procedure and that after the giving of such an award, no party could fall back on the cause of action which was the subject-matter of the reference to arbitration and which was merged in and extinguished by the award. It is argued that the position is in no way different even after the

1. (1906) I.L.R. 33 Cal. 881.

Arbitration Act, when, at any rate a defendant who has carried out his obligation, under the award asserts it in defence of a claim based on the cause of action in respect of which the award is given. The first respondent's counsel, Mr. Somasundaram, does not dispute that before the Arbitration Act the position was as contended for by the appellants, but maintains that the Arbitration Act has made a material change, and that neither a plaintiff nor a defendant can rely on an award when it has not been filed in accordance with the provisions of the Arbitration Act and a decree obtained in its terms. The principal reliance for the first respondent is on *Moolchand Jothajee* v. *Rashid Ramshed Sons & Co.*[1], which upheld on appeal under the Letters Patent the judgment of Somayya, J., in *Rashid Jamshed Sons & Co.* v. *Moolchand Jothajee*[2]. In that case, however, the award was put forward by the plaintiffs who sought a decree in terms of it, and the learned Judges held that the plaintiffs' allegation regarding the final conclusive and binding character of the award necessarily raised a question with regard to its existence and validity and that the suit was therefore barred by section 32 of the Arbitration Act.

In regard to an arbitration without the intervention of Court as in the present case, the Arbitration Act lays down the procedure for the successive stages from the commencement of the arbitration to the passing of a decree in terms of the award. Sections 8 to 12 provide for the appointment or removal by Court of arbitrators or umpire in certain cases. Section 13 confers certain powers on them. The award is required to be signed by the arbitrators or umpire, and notice in writing to the parties of the making of the award is enjoined by section 14 (1). If any party so desires, the arbitrators or umpire are directed by section 14 (2) to file the award into Court and to give notice to the parties of such filing. By an amendment by the Arbitration Act, of Article 178 of the Limitation Act, the period for filing an award in Court is 90 days from the date of service of the notice of the making of the award. The power of the Court to modify the award or to remit it is dealt with in sections 15 and 16, and under Article 158 of the Limitation Act as amended by the Arbitration Act, an application to set aside an award or to get an award remitted for reconsideration must be filed within 30 days of the date of service of the notice of filing of the award. If the Court sees no cause to set aside an award or remit it, it shall, under section 17, proceed to pronounce judgment according to it, after the time for making an application to set aside has expired or if such application has been made, after refusing it. Upon the judgment so pronounced a decree shall follow.

The material sections however on which the point raised in this appeal turns are sections 31, 32 and 33 which have to be set out in full :

" 31. (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

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1. (1946) 1 M.L.J. 185 : I.L.R. (1946) Mad. 840. 2. (1945) 2 M.L.J. 98.

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also and it may pass such orders for discovery and particulars as it may do in a suit."

Section 31 lays down certain rules and imposes certain restrictions as to the Court to which applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings may be made or in which an award may be filed. Sub-section (2) of section 31 provides *inter alia* that all questions regarding the validity, effect or existence of an award shall be decided by the Court in which the award has been, or may be, filed and by no other Court. This, however, raises no difficulty in this case, as it is conceded that the lower Court is a Court having jurisdiction in the matter to which the reference relates and therefore the Court in which the award may be filed. There can be no doubt that section 31 merely regulates the forum, and we notice that this is the view which found acceptance in *Bengal Jute Mills Co., Ltd.* v. *Jewraj Heeralal*[1], where McNair, J., pointed out that section 31 is not an enabling section but a section which merely defines the jurisdiction.

Turning to sections 32 and 33 it must first be observed that while section 33 provides for an application by a person

" desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined."

Section 32 uses what may be regarded as somewhat wider language that

" no suit shall lie . . . . . . for a decision upon the existence, effect or validity of an arbitration agreement or award."

It is a fundamental principle of statutory interpretation that when the right of suit is taken away and the remedy by way of an application is substituted for it, the prohibition would ordinarily be presumed to be co-extensive with the new remedy that is provided. An analogical case is where the jurisdiction is taken away from Civil Courts and conferred on Revenue Courts, the extent to which it is conferred on the latter being regarded as determining the extent to which the former are deprived of it. *Vide* sections 13 and 21 of the Madras Hereditary Village Officers Act of 1895 and *Muvula Seetham Naidu* v. *Doddi Ramu Naidu*[2]. It would therefore seem as if section 32 notwithstanding its apparently wider language, has to be read only as precluding a suit praying for the relief for which an application is provided under section 33.

Apart from this however and taking the language of section 33 as it stands, it is difficult to hold that the words " no suit shall lie " should be read as prohibiting a defence which involves a decision upon the existence, effect or validity of an award. As held in *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*[3], a person who relies on an award may be said to be seeking a decision upon its existence, effect or validity ; but the question that arises is whether the inhibition in section 32 is not confined merely to a plaint by which such decision is sought. We are inclined to think that it is so confined. There is nothing in *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*[3], inconsistent with this view, that decision, as already stated, being concerned with a suit in which the plaintiffs sought to enforce the award. Mr. Somasundaram lays some emphasis on the observations occurring in that decision that,

" The scheme of the Act is to prevent the parties to an arbitration from agitating questions relating to the arbitration in any manner other than that provided by the Act."

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1. I.L.R. (1943) 2 Cal. 392.
2. (1909) 20 M.L.J. 91 : I.L.R. 33 Mad. 208.
3. (1946) 1 M.L.J. 185 : I.L.R. (1946) Mad. 840.

In our opinion that sentence should not be taken out of its context and must be understood to have reference only to the particular situation which the learned Judges were called upon to deal with.

Some other decisions have also been cited ; but they do not need anything more than a passing reference. In *Ratanji Virpal & Co.* v. *Dhirajlal Manilal*[1], Chagla, J., of the Bombay High Court held that under the Indian Arbitration Act, 1940, till the award has been filed it is not competent to a party to an arbitration to file a petition for setting aside the award. To the same effect is the judgment of McNair, J., in *Bengal Jute Mills Co., Ltd.* v. *Jewraj Heeralal*[2]. In *Nanhelal* v. *Gulabchand*[3]; Pollock, J., of the Nagpur High Court held that section 32 of the Arbitration Act does not bar a suit to enforce an arbitration award ; but this is directly opposed to the decision of the Division Bench of this Court in *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*[4]. In *Balwant Singh* v. *Ramcharan Singh*[5], a Bench of the Allahabad High Court held that if a party files an application under section 33 of the Arbitration Act challenging the existence or validity of an award, the procedure laid down in sections 14, 15 and 16 of the Act is not thereby made immediately applicable and that proceedings under section 33 are entirely different from proceedings under sections 14, 15, 16 and 17. None of these decisions is of any help in deciding the point under consideration in this case.

Mr. Somasundaram points out that the award contemplates the payment of Rs. 19,000 to the plaintiff on 25th April, 1943 and simultaneously with it the execution of a document of relinquishment by the plaintiff and argues therefrom that the defendants must be taken to be seeking to enforce the award. In the first place such a document is suggested only by way of further assurance and abundant caution. Its absence will in no way prejudice the rights of the defendants, nor will it enable the plaintiff to claim a partition of the properties even after receiving the amount. The award would afford a complete answer to the plaintiff's claim for partition when, at any rate, the defendants carry out on their side the direction contained in it.

A possible case was hinted at or just suggested in the course of the arguments. If an award intends that the original cause of action should be extinguished only when what is directed by it is carried out by the party seeking to rely on it, what, it is asked, would be the relative position of the parties ? In such a case it would seem on the principle of accord and satisfaction that a party seeking to rely on the award in resistance of a claim based on the original cause of action must necessarily plead and prove performance of the award by him and a reliance on the award without the defendant fulfilling its terms on his part would be unavailing as it will be accord without satisfaction.

However, the point in this case turns entirely on the construction of section 32. As previously indicated, its language does not, in our opinion, extend to a defence as opposed to the filing of a suit. The argument on behalf of the plaintiff would involve our holding that, even in a case where both parties to an award are satisfied with it and it is fully carried out and there is therefore no need for getting a decree passed in its terms and none is passed, one of the parties can subsequently change his mind and enforce the original cause of action and the defendant cannot resist the suit. It seems to us that the provisions of the Act do not entail such a result.

As stated, the defendants offered to pay the amount which they had been directed to pay by the award, and are now willing to have a decree passed for it in the plaintiff's favour. We therefore hold that the defence should have been upheld by the lower Court. In this view it is unnecessary to deal with Mr. Subba Rao's alternative argument that the registered award embodies a family settlement

1. I.L.R. (1942) Bom. 452.
2. I.L.R. (1943) 2 Cal. 392.
3. I.L.R. (1944) Nag 340.
4. (1946) 1 M.L.J. 185 : I.L.R. (1946) Mad. 840.
5. I.L.R. (1944) All. 375.

and that on the principle laid down in *Subbaraju* v. *Venkataramaraju*[1], it may even if not entertainable as an award, be dealt with as a family settlement.

The result is that the appeal must be allowed and the decree of the lower Court reversed with costs of both the Courts payable by the plaintiff to defendants 1 to 4; but there will be substituted for the decree of the lower Court a decree dismissing the suit for partition but directing the payment by defendants 1 to 4 to the plaintiff out of their family properties Rs. 19,000 with interest thereon at 3 per cent. per annum from 25th April, 1943, till 30th November, 1943, during which period the amount was lying in fixed deposit in the Co-operative Bank and could have been drawn by the plaintiff and interest at 4 per cent. per annum thereafter.

We desire finally to observe that if the Legislature intended or intends to forbid reliance on an unfiled award even by way of defence the language of sections 32 and 33 would require suitable modification.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

A. Vedachala Mudaliar .. *Petitioner**

v.

The Central Road Traffic Board, Madras and another .. *Respondents.*

Certiorari, *writ of—Jurisdiction of High Court to issue—Central Traffic Board, Madras, appointed under the Motor Vehicles Act allowing an incompetent appeal—Act without jurisdiction—Quashing by the issue of a writ of* certiorari—*Justifying the order on facts not contained in the order—Not a good return to a rule nisi for the issue of a writ of* certiorari—*Motor Vehicles Act Rules, rr.* 149 *and* 150—*Scope of the powers under.*

The petitioner had a permit to run buses on a particular route from Madras to Mahabalipuram. He applied to the Regional Transport Officer, Vellore, for permission to divert his buses at an intermediate place along a different route. The Regional Transport Authority notified under section 57 (3) of the Motor Vehicles Act about the receipt of this application and after waiting till the date fixed for its consideration granted on 28th April, 1947, the permission as prayed for by the petitioner as apparently no representations were received from anybody. The second respondent, another bus service, preferred an appeal to the Central Traffic Board against the granting of the permission to the petitioner, though it had at no time till then objected to the grant of the permission. Without apparently realising that the second respondent was not entitled to appeal under section 64 of the Motor Vehicles Act, the Central Traffic Board purported to allow it on 25th June, 1947, and cancelled the diversion of the route. The petitioner preferred a petition to the Provincial Government but they declined to interfere with the order passed. The petitioner thereupon applied to the High Court for the issue of a writ of *certiorari* to quash the order of the Central Traffic Board on the ground that the appeal by the second respondent was not competent and that the Board acted without jurisdiction in purporting to allow such an appeal and in cancelling the permission already granted to the petitioner. On behalf of the Central Traffic Board while it was conceded that the appeal was incompetent, it was contended that the High Court has no jurisdiction to issue the writ, and that though the order sought to be quashed could not be justified as an order on a valid appeal, nevertheless it was a valid order passed in exercise of the powers conferred on the Central Traffic Board under rule 149 of the rules framed by the Local Government under the Motor Vehicles Act. It was further contended that in effect the petitioner was seeking to obtain the issue of the writ against the Provincial Government which the High Court has no power to issue.

Held: The body whose order was being challenged is located and had passed the order within the limits of the original jurisdiction of the High Court. Further as Madras is a terminus on the bus route, it must be held that the transport business was being carried on at least in part in Madras, though it was also being carried on outside the limits of Madras, and as such it cannot be said that the High Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the Central Traffic Board.

Ryots of Garbandho v. *Zamindar of Parlakimedi*, (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. 1944 Mad. 457 (P.C.), discussed.

The order sought to be quashed cannot be supported as an order passed in the exercise of powers conferred by rule 149 of the rules framed under the Motor Vehicles Act as it does not

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1. (1928) 55 M.L.J. 429 : I.L.R. 51 Mad. 800 (F.B.).

* C.M.P. No. 60 of 1948. 17th February, 1948.

empower the Central Board to call for any order passed by the Road Traffic Board and to pass an order setting aside or modifying that order. Further, it did not appear on the face of the record that the Central Traffic Board was purporting to exercise a power conferred by rule 149. It is not a good return to a rule *nisi* for the issue of a writ of *certiorari* to state that the order is justified on facts not contained in the order and the High Court cannot take notice of such facts.

The dismissal of the petitioner's petition to Government cannot be said to be an order passed under any of the provisions of the rules validly framed under the Act. The language of rule 150 is both inadequate and inappropriate to confer a right on the Provincial Government to interfere in revision with orders of the Road Traffic Board and the Central Board in respect of which appeals are specifically provided.

The order of the Central Traffic Board was without jurisdiction and must be quashed.

The anomaly and hardship resulting from the decision of the Judicial Committee in the *Parlakimedi case* pointed out and the attention of the Legislature drawn to it.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling upon the Central Road Traffic Board, Madras, to send up the records in its proceedings No. 9820-A 1/47 before them and to quash the order dated 26th June, 1947, and direct the restoration of the order of the Road Transport Authority permitting a diversion of the buses of the petitioner plying between Madras and Mahabalipuram *via* Manamady.

A. V. Viswanatha Sastri and *S. Swaminathan* for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) instructed by the Crown Solicitor and *P. S. Kailasam* for 1 and 2 Respondents.

The Order of the Court was made by

The Officiating Chief Justice.—This is an application for the issue of a writ of *certiorari* calling upon the Central Road Traffic Board, Madras, to send the records in its proceedings No. 9820-A1/47 and to quash the order made by it on 26th June, 1947.

The petitioner is the proprietor of a bus transport service named Sri Gandipan Bus Service. He had been granted permits to run three buses on the route from Madras to Mahabalipuram. On the 1st of December, 1946, the petitioner applied to the Regional Transport Officer, Vellore, for permission to divert his buses on the route between Madras and Mahabalipuram at a village named Yechur to a village called Manamady, 2-1/2 miles from Yechur. Prior to this application there was a petition from the villagers of Manamady praying for a diversion of the buses plying from Madras to Mahabalipuram to their village. The Regional Transport Authority published a notification on the 25th March, 1947, under section 57 (3) of the Motor Vehicles Act, 1939, intimating that an application had been received from the petitioner for diversion of his buses running between Madras and Mahabalipuram *via* Manamady, fixing the date for representation to the 10th April, 1947, and the date for consideration of the application to the 26th April, 1947. Apparently no representations were received and on the 28th April, 1947, the Regional Transport Officer, Vellore, passed an order permitting the petitioner to run his buses in the same route from Madras to Mahabalipuram *via* Manamady until further orders.

The second respondent to this application is Sri Thirupurasundari Bus Service, Tirukalikundram. On its behalf an appeal was preferred to the Central Road Traffic Board on the 29th April, 1947. It may be mentioned that the second respondent was not a person who had objected to the grant of the permission sought by the petitioner and he was not entitled to prefer an appeal under section 64 of the Motor Vehicles Act. Under that provision it is only a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof that is entitled to prefer an appeal to the prescribed authority within the prescribed time and in the prescribed manner. This was not apparently realised by the appellate authority, the Central Road Traffic Board, which purported to allow the appeal by its order dated 25th June, 1947. It is this order that is sought to be quashed and it runs as follows :—

"The appeal is allowed. The diversion granted to the respondent Messrs. Gandipan Bus Service is cancelled restoring the original route as before, *i.e.*, from Madras to Mahabalipuram."

Against this order, the petitioner preferred a petition to the Provincial Government but the Government by its order dated 17th December, 1947, declined to interfere with the order of the Central Road Traffic Board. The petitioner thereupon filed the application before us for the issue of a writ of *certiorari* to quash the order on the ground that the appeal by the second respondent was not competent and the Central Road Traffic Board, the first respondent, acted without jurisdiction in purporting to allow the appeal of the second respondent and in cancelling the permission already granted to him.

It was conceded on behalf of the Central Road Traffic Board, the first respondent, that the appeal by the second respondent was incompetent, *vide* paragraph 8 of the counter-affidavit filed on behalf of the first respondent. *Prima facie* therefore the order of the first respondent was without jurisdiction. But the learned Advocate-General on its behalf raised two objections to the issue of a writ by this Court. The first was an objection as to the jurisdiction of this Court to issue the writ. This objection is based on the decision of the Judicial Committee in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*[1], where it was held that the High Court at Madras had no power to issue a writ of *certiorari* to quash the order of the Board of Revenue passed in certain settlement proceedings relating to the estate of Parlakimedi in the Ganjam District. The learned Advocate-General contended that as the Regional Transport Authority which passed the original order had its office outside the limits of the original jurisdiction of this Court and as the subject-matter and the parties were both outside the said limits, this Court is not entitled to issue a writ of *certiorari*. The fact that the Central Road Traffic Board had its office in Madras was, he contended, of no importance just as the fact that the Board of Revenue was located in the town of Madras did not matter in the *Parlakimedi case*[1]. Before we decide whether the decision of the Judicial Committee in the *Parlakimedi case*[1] has any application to the facts of the present case, it is necessary to examine the *ratio decidendi* of that decision. In that case there was a dispute between the Zamindar of Parlakimedi and the ryots of certain villages in his estate in respect of the settlement of rent of these villages. The Government of Madras had directed the Special Revenue Officer of the district to settle a fair and equitable rent in respect of lands in the said villages and the officer made an order doubling the previous rents. There was an appeal by the ryots to the Board of Revenue. A member of that Board sitting alone reversed the decision and allowed an increase of rent of only 12-1/2 per cent. considering himself bound by proviso (*b*) of clause (1) of section 30 of the Madras Estates Land Act. The Zamindar appealed by way of revision to the Collective Board of Revenue from the decision of the single member and the Collective Board of Revenue decided by a majority that the single member was wrong in his assumption that section 30, clause (1) proviso (*b*) applied to the case. The Collective Board however fixed the increase at 37-1/2 per cent. to be spread over a period of five years. The ryots applied for a writ of *certiorari* to quash the order of the Collective Board of Revenue. It is clear therefore that in that case there was a dispute between the parties in respect of rights governed by custom contract and statute and they were litigating their rights before Courts or judicial bodies appointed for the purpose by statute. As the Judicial Committee point out, the parties, *viz*, the Zamindar on the one side and the ryots on the other, were not subject to the original jurisdiction of the High Court and the estate of Parlakimedi lay in the north of the Province. The only ground on which the power of the High Court to issue the writ could be based was the fact that the Board of Revenue was located in Madras and the order was made within the town. But the position of the Board of Revenue was really that of a Court, though it is true that the Judicial Committee considered that it may not be proper to describe it as a Court in a hierarchy of Revenue Courts. It was, they point out, an official body especially entrusted with particular duties which include duties of a judicial character. In

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).

our opinion the rationale of the rule enunciated by their Lordships in the case is to be found in two passages, one at page 494 and the other at page 497. At page 494, their Lordships say as follows :—

"If that Sovereign, or the company, in exercise of the *diwani* right committed by him to them, chose to appoint an individual or an executive authority such as the Board of Revenue to give a decision between Indians in Ganjam upon particular matters of individual right, the Supreme Court by the terms of clause 8 of this charter could have no more right to interfere by *certiorari* with such a decision than in the case of the decision of one of the company's Courts."

At page 497, their Lordships observe thus :—

"Their Lordships think that the question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing *certiorari* to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court, in the matter of the settlement of rents for ryoti holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance ".

Now coming to the facts of the present case there are no parties here litigating their individual rights before a Court or a judicial body entrusted with power to adjudicate upon their individual rights. The right which the petitioner claims is a right which can only be granted by the authorities prescribed under the Motor Vehicles Act. There can be no dispute as to such a right between private parties. The dispute can only be between the party applying for, or objecting to, the grant of a permit. The position of the Regional Transport Authority and the Central Road Traffic Board in this behalf is not to any extent similar to the position of the Special Officer or the Board of Revenue in the *Parlakimedi case*[1]. It therefore becomes a matter of importance that the body whose order is being challenged is located, and has passed the order, within the limits of the original jurisdiction of this Court. Moreover, it cannot be said that no part of the subject-matter in question falls within the limits of the original jurisdiction of this Court. Admittedly Madras is a terminus on the route. An order of injunction which may be passed by this Court in the exercise of its original jurisdiction in a suit perperly constituted can certainly be enforced against the petitioner or the second respondent and their officers and servants here in charge of the buses plying to and from Madras. It must be held that the transport business is being carried on at least in part in Madras though it is also being carried on outside the limits of Madras. Applying the test laid down by their Lordships of the Privy Council in the *Parlakimedi case*[1], we fail to see how this Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the first respondent.

The learned Advocate-General drew our attention to the unreported decision of a Division Bench of this Court consisting of the late Chief Justice Sir Lionel Leach and Lakshmana Rao, J., in C.M.P. No. 4452 of 1946, in which the learned Judges observed that this Court would have no power to issue a writ to quash an order made by the Madras Hindu Religious Endowments Board appointing one of its officers to exercise all the functions of a trustee of a temple situated in a village in the Cuddappah district pending the framing of a scheme. The learned Judges say :—

"The Hindu Religious Endowments Board functions in Madras, but the order which is now in question relates to a temple in the mofussil. The case falls completely within the judgment of the Privy Council."

As we have already said the order now sought to be quashed does not relate to a matter which entirely arises outside the limits of this Court's original jurisdiction.

The learned Advocate-General next contended that though the order of the first respondent could not be justified as an order on a valid appeal presented by the second respondent, nevertheless it was a valid order passed in exercise of the powers conferred on the first respondent under rule 149 of the rules framed by the Local Government under the Motor Vehicles Act. We cannot accept this conten-

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).

tion for two reasons. It does not appear on the face of the record that the Central Road Traffic Board was purporting to exercise a power conferred on it by rule 149. The order was both in form and substance an order allowing an appeal by the second respondent. It is well established that it is not a good return to a rule *nisi* for the issue of a writ of *certiorari* to state that the order is justified on facts not contained in the order. This Court cannot take notice of any fact which does not appear upon the face of the order (*vide* Halsbury, Hailsham Edition, Volume IX, page 889 and *The King* v. *Liston*[1]). This excludes also any reference to a petition alleged to have been sent by the villagers of Mahabalipuram to the Central Road Traffic Board protesting against the diversion permitted by the Regional Transport Authority.

But in our opinion there is a more formidable objection to the tenability of the contention of the learned Advocate-General. Rule 149 on which reliance has been placed runs thus :—

> "The Central Board may call for such reports and records from any Road Traffic Board and pass such order as it may deem fit. The Road Traffic Board shall give effect to such orders."

According to the learned Advocate-General, this rule confers a power on the Central Board to interfere with and even set aside an order passed by the Regional Transport Authority though no appeal had been preferred, under rule 147 read with section 64 of the Act. In the first place the language of rule 149 is, in our opinion, wholly inappropriate to confer appellate or revisional powers on the Central Board in respect of *quasi* judicial orders passed by the Road Traffic Board or the Regional Transport Authority conferring valuable rights on parties. When the Courts or *quasi* judicial administrative bodies have been given powers of revision, the language used by the Legislature has been quite different and has been unambiguous. It is sufficient to refer to section 191 of the Sea Customs Act, section 57 of the Madras Co-operative Societies Act and sections 435 to 439 of the Criminal Procedure Code. Rule 149 does not empower the Central Board to call for any order passed by the Road Traffic Board and to pass an order setting aside or modifying that order. Rule 149 to our mind appears to contemplate the passing of an original order by the Central Board though such an order might be based upon reports and records obtained from any Road Traffic Board. The absence of any time limit and of the procedure to be followed before final orders are passed also indicates that the power conferred under rule 149 is not a power to revise orders passed by the Road Traffic Board affecting rights of parties.

The order of the first respondent therefore cannot be supported as an order passed in exercise of the powers conferred by rule 149. It is not necessary therefore to go into the question whether it will be open to the Provincial Government to make a rule conferring a power of revision on the Central Board apart from the right of appeal conferred by the statute itself.

The learned Advocate-General raised a further objection based upon the petition preferred by the petitioner to the Provincial Government, which had been dismissed. It was contended that this Court had no power to issue a writ of *certiorari* against the Provincial Government and in effect this is what the petitioner seeks in this application. Mr Viswanatha Sastri on behalf of the petitioner contends that though it is true that the petitioner approached the Government to set aside the order of the Central Road Traffic Board, there was no provision which gave him such a right and the order of the Provincial Government cannot be said to be an order passed under any of the provisions of the rules validly framed under the Act. The learned Advocate-General relied on rule 150 as conferring a right on the Provincial Government to interfere in revision with any order passed by the Central Board. Rule 150 runs thus :—

> "The Road Traffic Board and the Central Board shall in all matters be subject to the orders of the Government and shall give effect to all orders passed by the Government whether on appeal or otherwise."

1. (1793) 5 T.R. 338 : 101 E.R. 189.

Many of the remarks made by us as regards rule 149 apply *mutatis mutandis* to this rule also. The rule in our opinion has no reference to orders passed either by the Road Traffic Board or by the Central Board under powers given to them by statute or by rules affecting the rights of parties and against which appeals are specifically provided to the prescribed authorities. The rule, as the marginal note indicates, only declares the power of the Provincial Government to have superintendence over the two Boards. There may be matters in which the rights of parties are not concerned and which may be dealt with by the Government and the Government might give directions, general or particular, as regards several matters dealt with by the provisions of the Act in an administrative capacity. The language of rule 150 is both inadequate and inappropriate to confer a right on the Provincial Government to interfere in revision with orders of the Road Traffic Board and the Central Board in respect of which appeals are specifically provided. Here again we are not called upon to decide whether the Provincial Government can make a valid rule conferring on themselves a power of revision in respect to orders as to which there is nothing in the provisions of the Act to indicate that the Government have such a power.

It therefore follows that the order of the first respondent was passed without jurisdiction and must be quashed. The rule is made absolute. The petitioner will be entitled to his costs from the first respondent, advocate's fee Rs. 200.

The argument in this case has prominently brought out the anomaly created by the ruling of the Judicial Committee in the *Parlakimedi case*, particularly having regard to the recent tendency in this country as in other countries to invest *quasi* judicial and administrative bodies with large powers to pass orders affecting interests of parties. It is a matter for consideration that persons within the limits of the original jurisdiction of this Court should have a remedy to approach this Court for the issue of a *certiorari* to quash illegal orders and orders made without jurisdiction, but that in respect of similar orders relating to subject matter outside the original jurisdiction of this Court such a remedy should be denied to parties outside its original jurisdiction. Whatever historical accidents might justify the ruling of the Judicial Committee in the *Parlakimedi case*, there is no reason why the anomaly resulting therefrom should be allowed to continue. This is a matter however for the Legilsature and our province is only to bring to their notice the anomaly and the hardship, caused to a great body of persons in the Province.

V.S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, AND MR. JUSTICE SATYANARAYANA RAO.

Muthuvenkatasubba Reddiar and another .. *Appellants.*

v.

Thangavel Chetti and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Execution Petition filed within three years but re-presented after the expiry of the period fixed for re-presentation—No petition to excuse delay—Order on such petition whether a final order.

The first of five execution petitions was filed within three years of the passing of the final decree in a mortgage suit, but re-presented a few days after the expiry of the period fixed for its re-presentation but without a petition to excuse the delay and on the decree-holder's re-presenting that it was not pressed, it was dismissed. The second was filed within three years of this order and was dismissed. The third, filed a few days thereafter was rejected. The fourth, filed within three years of that order of rejection was once again re-presented a few days after the expiry of the period fixed for re-presentation, but again without a petition to excuse the delay. There was a prayer that it was not pressed and that it might be dismissed. That petition was accordingly dismissed a week later. The last petition was filed within three years of this order. On the question, whether it is barred by the provisions of Article 182 (5) of the Limitation Act,

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*A.A.O. No. 651 of 1945. 9th January, 1948.

Held that the 1st and 4th petitions were terminated by a final order of dismissal and all the petitions presented in respect of the decree including the last one were filed within time and were not affected by the bar of limitation prescribed in the Article. A formal petition to excuse the delay in re-presentation is unnecessary and the Court can informally grant relief in that respect. Since the order of dismissal was made after delay in re-presentation had occurred, it must be presumed that what was required to be done was in fact done and that the making of the order of dismissal reflects that there was an order excusing the delay. Even assuming that the order of dismissal was made wrongly, nevertheless it was an order and it remains alive and effective unless and until it is set aside by means of a proper procedure.

Syed Gulam Khadir Sahib v. *Viswanatha Aiyar*, (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357 distinguished.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore dated the 27th February, 1945, and made in E.P. No 8 of 1943, in O.S. No. 26 of 1927.

S. Panchapakesa Sastri and T. E. Ramabhadrachari for Appellants.

A. V. Viswanatha Sastri , *T. S. Nagaswami Aiyar* and *N. Rangachariar* for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of an execution petition filed on November 21, 1941, in a mortgage suit, O.S. No 26 of 1927, on the file of the Subordinate Judge's Court of Cuddalore in which the final decree was passed on November 25, 1929. This is the judgment-debtor's appeal against the learned Subordinate Judge's order directing execution to issue.

The sole question arising is whether the execution petition is barred by the provisions of Article 182 (5) of the Limitation Act. It was filed a few days before the expiration of twelve years following the passing of the decree and the only point for consideration is whether the filing took place within three years of the final order in an earlier execution petition.

The execution petition, out of which this appeal arises, is the fifth of such petitions filed since the final decree in the suit was passed. The first four petitions were filed on (1) November 21, 1932, (2) November 19, 1935, (3) November 21, 1935, and (4) November 22, 1938. Petitions Nos. 1, 2 and 4 were purported to be dismissed and No. 3 was " rejected." It is conceded that, if there was a final order within the contemplation of Article 182 (5) in each of those petitions, then the present petition is not barred by limitation.

Mr. Panchapakesa Sastri for the judgment-debtors (Appellants) contended that the order, purporting to be of dismissal of petition No. 1 was not a final order and consequently petitions Nos. 2 and 3 were barred by limitation at the dates when respectively they were filed and, similarly, regarding petition No 4, so that the present petition falls within the statutory bar found in Article 182 (5). It is conceded that the orders passed in respect of petitions Nos. 2 and 3 were final orders and there is no question relating to those two petitions,, save that which arises with respect to petition No. 1 as previously mentioned. It was particularly argued that no final order was passed in petition No. 4 and, consequently, the execution petition out of which this appeal arises was not filed within three years of a final order passed in an earlier petition and is therefore barred by limitation.

With respect to Execution Petition No. 1, on 14th February 1932, a direction was given to re-present the petition in two weeks after complying with some requirements ; after some other directions had been given, on 16th December, 1932, time to re-present was extended until 11th January, 1933 ; on 18th January, 1933 (that is seven days after the time for re-presentation had expired on 11th January), the decree-holders informed the Court that the petition was not pressed and it was prayed that it be dismissed ; on 23rd January, 1933, the Court made an order in these terms : " This is not pressed and hence dismissed."

In respect of Execution Petition No. 4, after several extensions of time to re-present it had been ordered, on 3rd January, 1939, time was further extended by three days (i.e., to 6th January) ; on 11th January 1939, (i.e., five days after the

expiration of the extended period) the the petition was re-presented with a prayer that it was not pressed for the present and it might be dismissed; on 18th January 1939, the Court ordered the dismissal of the petition.

Mr. Panchapakesa Sastri argued that in respect of those two execution petitions when time had expired for re-presentation and in the absence of an application to excuse the delay and an order of Court granting such application, each petition had no legal existence and the position was the same as if it had not been re-presented, it had never emerged into legal existence and the Court was incapable of directing its dismissal; consequently, there was not a final order which had any force or effect, when the Court purported to direct its dismissal. *Syed Gulam Khadir Sahib* v. *Viswanatha Aiyar*,[1] was cited in support of that contention.

In the case just now cited an execution petition was filed in 1933; it was returned for compliance with a requirement to file encumbrance certificates; nothing further was done in that respect. In 1936, another execution petition was filed together with the earlier petition; notice having been given to them, the judgment-debtors objected to the second petition on the ground that it was barred by limitation. In June, 1937, a petition was filed requesting that the execution petition of 1933, be treated as re-presented with the necessary papers and the delay be excused; in September, 1937, the Court, by its order, refused to excuse the delay and, in consequence, rejected the 1933 petition, observing that a final order in respect of it had to be passed, and it was rejected as not having been re-presented in time. In that case there was an order refusing to excuse the delay occasioned in the 1933 petition, but such order was passed in an application made in the 1937 petition and not in the 1933 petition; upon that application being refused it was then that the 1933 petition was rejected. The judgment in *Syed Gulam Khadir Sahib's case*[1] was with respect to the particular facts therein arising, which are not the same as in the present instance. Special reference was made to some observations in the course of the judgment upon which learned counsel for the appellants placed reliance. At page 363 it was observed that the 1933 petition should have been treated as never having been duly presented, it was not before the Court, consequently it did not require an order to be made for its disposal and it had no legal existence; at page 366 it was further observed that an execution petition returned for amendment but not re-presented has no legal existence until it is re-presented and if it is re-presented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused. In my view those observations refer only to the peculiar facts of the case itself.

The facts and circumstances relating to petitions Nos. 1 and 4, in the present instance, are substantially the same and a discussion of petition No. 1 alone is necessary. There is no provision of law requiring a separate application having to be made to excuse the delay in re-presenting an execution petition and an informal oral application in that behalf will suffice. Here, no separate application or petition was filed to excuse the delay in re-presenting the petition. The Court made an order dismissing the excution petition. Such dismissal, ordinarily, is a final order contemplated in Article 182 (5). No appeal against the order was preferred and it remains extant.

Mr. Panchapakesa Sastri's argument is a challenge to the correctness and validity of the order of dismissal, his contention being that, whilst it purports to be a final order, since the execution petition was not re-presented within the period limited, it should follow that thereafter the petition had no legal existence and in respect of it an order of dismissal could not properly be made and therefore the petition could not have been "dismissed". That argument, in effect, is similar to an endeavour to go behind a decree of Court and to contend that the decree is invalid although it has never been set aside. Even assuming that the order of dismissal was made wrongly, nevertheless it was an order and it remains alive and effective

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1. (1942) 2 M.L.J. 768: I.L.R. 1043 Mad. 357.

unless and until it is set aside by means of a proper procedure which has not taken place in the present instance.

In my opinion the judgment-debtors cannot question the validity of the order of dismissal which was made by a Court of competent jurisdiction in respect of an execution petition which was before it. Further, as a formal application to excuse the delay is unnecessary and the Court can informally grant relief in that respect, since the order of dismissal was made after delay in re-presentation had occurred, it can be presumed that what was required to be done was in fact done and that the making of the order of dismissal reflects that there was an order excusing the delay.

In my opinion, in respect of excution petitions Nos 1 and 4, each was terminated by a final order of dismissal and that all the execution petitions presented in respect of the decree, including the one out of which this appeal arises, were filed within time and were not affected by the bar of limitation prescribed in Article 182 (5) of the Limitation Act. There being no other objection to the correctness of the order of the learned Subordinate Judge directing execution to proceed, it follows that this appeal should be dismissed with costs of the decree-holders.

Satyanarayana Rao J :—I agree.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Kolathukara Vaiyapuri Goundan .. *Petitioner**.

v.

Kuppuswami Goundan .. *Respondent.*

Indian Penal Code (XLV of 1860) sections 427 and 23—Crops raised by a person on land not belonging to him—Cattle driven to graze on that land by accused—Loss of crop, whether wrongful loss—Accused, if guilty of offence under section 427.

Where a person not entitled to a piece of land or to raise any crops on it, raises crops on it and the accused's cattle are alleged to have been driven into the land, and the crop thereby destroyed, on the question whether an offence was committed under section 427, Indian Penal Code,

Held, that in order to constitute an offence under section 427, Indian Penal Code, there should have been an intention to cause " wrongful loss " as defined in section 23, Indian Penal Code, (*i.e.*) loss by unlawful means of property to which the person losing it is legally entitled. As the complainant was not legally entitled either to the land or to the crops standing on it, there was no "wrongful loss " to him and hence no offence under section 427 was committed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Karur, in C.C.No. 176 of 1945, dated 30th March, 1946.

A. V. Narayanaswami Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Respondent not represented.

The Court made the following

ORDER.—The petitioner has been convicted under section 427 of the Indian Penal Code, and sentenced to pay a fine of Rs. 30. There was a piece of land which was unoccupied and both the complainant, P.W. 6, and the petitioner were trying to obtain it under an assignment but in the meantime each was using it in his own way occasionally. Ten days prior to the occurrence P.W. 6 sowed some cholam and very tender crops sprouted. The cattle belonging to the petitioner is said

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*Crl.R.C. No. 896 of 1946. 28th August, 1947.
(Crl.R.P. No. 862 of 1946).

to have been driven into that land and the result was that the tender crop was destroyed. The question is whether this amounts to an offence under section 427 of the Indian Penal Code. It is necessary to constitute an offence under section 427 of the Indian Penal Code that there should have been an intention to cause wrongful loss or damage to the public or to any person. There might have been an intention to cause loss to the village munsiff, P.W. 6, by allowing the cattle to enter and graze on the land when there was a crop on it. But the question is whether the intention was to cause wrongful loss, as defined in section 23 of the Indian Penal Code. "Wrongful loss" is defined as loss by unlawful means of property to which the person losing it is legally entitled.

Here it is quite clear that the village munsiff, P.W. 6, was not legally entitled either to the land or to the crop standing on it as he had no permission to cultivate the land or to raise any crop thereon. No doubt there is the first explanation to section 425, but in my opinion it does not apply to a case like this. The petition is allowed. The conviction and sentence are set aside and the fine if paid will be refunded.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

A. Narayana Nair .. *Petitioner.*

v.

The Secretary, Triplicane Urban Co-operative Society, Ltd. .. *Respondent.*

Madras Co-operative Societies Act (VI of 1932), section 51—Suit for damages for wrongful dismissal of a servant by a co-operative society—Dispute regarding disciplinary action—Jurisdiction of Civil Court to entertain.

An exception is recognised in section 51 of the Madras Co-operative Societies Act in respect of disputes regarding "disciplinary action by the society or its committee against a paid servant of the company".

Where in a suit for damages by a dismissed servant of a co-operative society the dismissal is sought to be justified as a disciplinary action taken by the society, the dispute is one which is outside the purview of section 51 of the Act and therefore the bar imposed upon the jurisdiction of the Civil Court would not arise.

Judgment of Kuppusswamy Iyer, J., in C. R. P. No. 1134 of 1940 distinguished.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, in N.T.A. No. 203 of 1945, preferred against the order of the said Court of Small Causes, Madras, in suit No. 2007 of 1945.

K. S. Narayana Aiyangar for Petitioner.

C. Rangaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition by the plaintiff against the judgment of the Full Bench of the Small Causes Court, Madras, in N.T.A. No 203 of 1945, dismissing an application for new trial.

The suit was instituted for recovery of Rs. 97-1-0 from the defendant, the Secretary, Triplicane Urban Co-operative Society Ltd., as damages for wrongful dismissal. The plaintiff was employed by the defendant society as driver of motor car on a monthly salary of Rs. 28-0-0 plus allowances but was dismissed on the 6th April, 1945, according to the plaintiff, wrongfully and without any just cause. The defendant in the pleas filed on his behalf maintained that the dismissal of the plaintiff was for good and sufficient cause as he was constantly absenting himself from work without leave and was shirking work and that the jurisdiction of the Civil Court was barred under section 51 of the Madras Co-operative Societies Act.

* C.R.P. No. 1502 of 1946. 5th November, 1947.

The question of jurisdiction was disposed of as a preliminary point by the Judge of the Small Causes Court who upheld the objection of the defendant and directed the return of the plaint for presentation to proper Court. The plaintiff then filed an application for new trial, application No. 203 of 1945, which was disposed of by a Full Bench of the Small Causes Court. The Full Bench agreed with the contention of the learned trial Judge and confirmed his order. The plaintiff complains against this order.

The only question that arises for consideration is whether the jurisdiction of the Civil Court is barred by reason of section 51 of the Madras Co-operative Societies Act. According to that section,

"If any dispute touching the business of a registered society arises. . . . . (c) between the society or its committee or any past committee, any officer, agent or servant or any past officer, past agent or past servant . . . . . . of the society, ... such dispute shall be referred to the Registrar for decision."

An exception however is recognised in this section in respect of disputes regarding "disciplinary action taken by the society or its committee against a paid servant of the society." The dismissal of the plaintiff is the result of the disciplinary action taken by the defendants as the plaintiff was frequently absenting himself without leave and therefore the defendants claim that their action is justified. The dispute, therefore, now between the plaintiff and the defendant is whether the action taken by the society by way of punishing the plaintiff by dismissing him from service is proper or not and this dispute is within the exception. The reliefs claimed in the plaint also are based on the allegation that the dismissal of the plaintiff from service was wrongful. My attention has been drawn to a judgment of Kuppuswami Aiyar, J., where the learned Judge held that a claim by a dismissed servant of a Co-operative Society for recovery of provident fund, travelling allowances and the value of some stationery and postage and a small fraction of salary raised a dispute touching the "business" of a registered society and therefore the jurisdiction of the Civil Court was barred. It was not a case in which the dispute raised can be said to be a dispute regarding disciplinary action. Further in that case no reference was made to the exception already noticed perhaps rightly, and therefore that decision cannot be treated as authority on the construction of the exception contained in section 51 (*vide* the judgment in C.R.P. No 1134 of 1940).

I think therefore that on a plain reading of the section the dispute in this case is a dispute which is outside the purview of section 51 and therefore the bar imposed upon the jurisdiction of the Civil Court by that section does not arise. The result is the orders of the Courts below directing the return of the plaint for presentation to proper Court are set aside and the suit is remanded to the trial Court for disposal on the merits and the plainttiff is entitled to costs throughout. The costs in the trial Court are fixed at Rs. 10.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

The District Magistrate of Vizagapatam .. *Referring officer.*

Criminal Procedure Code (V of 1898), sections 496—Bail, granting of—Imposition of conditions—Legality.

In bailable offences there is no question of discretion in granting bail as the words of section 467, Cr. P. Code, are imperative. In such cases the Criminal Court has no discretion while granting bail to impose any condition except demanding of security with sureties.

Where a Magistrate while releasing the accused on bail stated that besides executing bonds with sureties, their release was subject to the condition that the accused would not enter upon the land in dispute for a particular period and that they would not commit any breach of the peace,

Held, that the conditions were repugnant to the principle underlying section 496 of the Code of Criminal Procedure and they have to be deleted.

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* Crl. M.P. No. 1584 of 1947. 31st October, 1947.

Petition . . . Letter R.C. No. 3621 of 1947. C. 5 dated 12th September, 1947, from the District Magistrate of Vizagapatam, filed therewith the High Court will be requested to modify the order of the Court of the Stationary Sub-Magistrate of Chodavaram in Crime No. 69 of 1947, Koduru Police Station by deleting the conditions referred to therein.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Court made the following

ORDER.—This is a reference made by the District Magistrate of Vizagapatam in the following circumstances.

A charge sheet was filed by the Koduru Police against 14 persons charging them with offences under sections 147 and 324 of the Indian Penal Code.

Both these offences are bailable and the accused applied for bail. While releasing them on bail under section 496 of the Code of Criminal Procedure, the Stationary Sub-Magistrate, Chodavaram, stated that besides executing a bond for Rs. 500 each with two sureties for a like sum for each surety, their relase was subject to the condition that they would not enter upon the land in dispute for a period of one month or until the land dispute is decided by a Court of law whichever is earlier and also subject to the condition that they would not commit breach of peace. The District Magistrate rightly points out that these conditions are repugnant to the principle and policy of section 496 of the Code of Criminal Procedure.

In bailable offences it is well settled that there is no question of discretion in granting bail as the words of the section are imperative. The only choice for the Court is as between taking a simple recognisance of the principal offender or demanding security with surety. Ordinarily the word "bail" applies to the second kind of security according to the practice and procedure of the Courts. The Criminal Court has no discretion in bailable offences while granting bail under section 496 of the Code of Criminal Procedure to impose any condition except the demanding of security with sureties. The reference is accepted and the order of the Magistrate passed on 14th August, 1947, granting bail to the accused is modified by deleting from the order the conditions mentioned above.

K.C. *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Kandaswami Mudali ... *Appellant*.*

v.

K. R. Narasimha Ayyar and others ... *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Sale contrary to agreement between decree-holder and the person interested in the property—Sale for undervalue—Fraud and substantial injury—Sale, liability to be set aside.

Sale of property contrary to an agreement between the decree-holder, the assignee-decree-holder and the person interested in it that the property would not be brought to sale if the latter pays a certain sum of money, amounts to fraud on the part of the decree-holder. Once fraud is made out on the part of the decree-holder and it has resulted in substantial injury, the property being sold for an inadequate price, the fact that the purchase by the auction-purchaser was a *bona fide* one without notice of the fraud does not matter and the sale has to be set aside.

Lalla Bunsee Dhur v. *Koonwar Bindesree Dutt Singh,* (1866) 10 M.I.A. 454 and *Bireswar Ghose* v. *Panchkouri Ghose,* (1922) 27 C.W.N. 587 referred to.

There is no warrant for limiting fraud to a fraud in conducting the sale.

Sheikh Maula Bux v. *Raghubir Ganjhu,* (1918) 3 Pat.L.J. 645 referred to.

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 12th December, 1944, in E.A. No. 814 of 1942, in E.P. No. 383 of 1941, in O.S. No. 194 of 1928.

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* A.A.O. No. 426 of 1945. 18th November, 1947.

T. L. Venkatarama Aiyar for Appellant.

A. Srirangachariar and *E. A. Viswanathan* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the auction-purchaser from the order of the Subordinate Judge of Coimbatore setting aside a sale at the instance of the 98th defendant, who is interested in item 4 and who came forward with an application under Order XXI, rule 90 and section 47 of the Civil Procedure Code alleging that it had been agreed between him and the decree-holders and the assignee-decree-holders that the property was not to be brought to sale on his payment of Rs. 1500 and that as a matter of fact, he paid the amount, which was passed on to the decree-holders. The Subordinate Judge held that this agreement had been proved and that the sale of the property contrary to the agreement amounted to a fraud on the part of the decree-holder. He also found that the property was sold for an under-value. The auction purchaser had no kowledge of the agreement.

Thus, it is a case where we have to decide which of two innocent parties should suffer—the 98th defendant or the auction-purchaser—the very question, which their Lordships of the Privy Council posed for answer in *Lalla Bunsee Dhur* v. *Koonwar Bindesree Dutt Singh*[1]. Once fraud is made out on the part of the decree-holder and it has resulted in substantial injury, the fact that the purchase by the auction-purchaser is a *bona fide* one without notice of the fraud does not seem to matter. It was so held in *Bireswar Ghose* v. *Panchkouri Ghose.*[2]

The argument addressed by the appellant is that the fraud must be in conducting the sale, *i.e.*, in taking the requisite steps for bringing the property to sale. For this limited interpretation there is really no warrant. The fraud may be at various stages and the very first stage is when property, which was agreed not to be sold, is brought to sale, contrary to the agreement. " Conduct of the sale " means and includes every step taken from the beginning to the end for the purpose of bringing the property to sale. This is what was held in *Sheik Mulla Bux* v. *Raghubir Ganjhu*[3]. The general observations found in *Rawa Mahton* v. *Ramakrishna Sing*[4], are not of much use so far as the facts in this case are concerned. Fraud having been found and inadequate price, the lower Court had a right to set aside the sale. The auction-purchaser does not lose much, though if it was an exceedingly good bargain in the sense that property was purchased for a very low value, his loss might be substantial. By the sale being set aside, he gets back what he has paid and he will have every opportunity to bid for it again at a fresh sale, if he is keen on its acquisition.

The civil miscellaneous appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CLARK.

Gadiraju Srirama Sarma and others .. *Petitioners**

v.

Gadiraju Venkatappa and others .. *Respondents.*

Madras Civil Courts Act (III of 1873) section 14—Suit for partition and possession—Jurisdictional value, ten times, the annual revenue payable to Government—Court Fees Act (VII of 1870), section 7 (v) (b).

The effect of section 14 of the Madras Civil Courts Act is that in the case of a suit for partition and possession falling under section 7 (v) (*b*) of the Court Fees Act the jurisdictional value should be determined under the latter provision, that is at ten times the annual revenue payable to the Government.

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1. (1866) 10 M.I.A. 454.
2. (1922) 27 C.W.N. 587.
3. (1918) 3 Pat.L.J. 645
4. (1887) I.L.R. 14 Cal. 18.

* C.R.P. No. 1439 of 1945. 9th January, 1948

Petition under section 115 of Act V of 1908 to revise the order of the Court of the Subordinate Judge of Tenali, dated 18th July, 1945, in C.M.A. No. 27 of 1944 preferred against the order of the Court of the District Munsiff, Tenali, in O.S. No. 81 of 1943.

Ch. Raghava Rao for Petitioners.

C. V. Narasimha Rao for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners were the plaintiffs in the Court of the District Munsif of Tenali. They sued for partition of certain property and for possession from the alienees. The respondents objected that the value of the suit was beyond the pecuniary jurisdiction of the Court. The District Munsiff upheld this objection and returned the plaint to the petitioners for presentation to the proper Court. They appealed to the Subordinate Judge of Tenali who upheld the decision of the District Munsiff. The petitioners now ask that these orders may be set aside.

Before the Subordinate Judge it was conceded that the claim falls within section 7 (v) of the Court-Fees Act, and before me it has been conceded that so far as concerns the claim to partition and possession it is one falling within clause (*b*) of that provision. I desire to make it clear that this was conceded only with reference to the claim for partition and possession and not as regards the suit generally, because counsel for the respondents urged that there were other claims in the suit, which, if considered, would give the suit a value for jurisdiction in excess of the District Munsiff's jurisdiction if the petitioner's contention as regards the valuation of the relief for partition and possession is accepted. I am not prepared to discuss this aspect of the case. Admittedly no objection on this point was raised before either of the Courts below, and accordingly neither Court has considered or come to any conclusion on this point. I propose to confine my order to a consideration of the decision of the Courts below as to the value for jurisdiction of the claim to partition and possession.

It seems to me that once it is conceded, as in the case here, that the claims are claims falling within section 7 (v) (*b*) of the Court-Fees Act, the matter is concluded by section 14 of the Madras Civil Courts Act which provides that,

> " When the subject-matter of any suit or proceeding is land, a house or a garden, its value shall, for the purposes of the jurisdiction conferred by this Act, be fixed in the manner provided by the Court-Fees Act, 1870, section 7, clause (v)."

Admittedly the subject-matter of the suit is within this provision, and accordingly the value for jurisdiction will be that fixed under section 7 (v) (*b*) of the Court-Fees Act. That provision provides for assessment of value at ten times the annual revenue payable to Government. On that valuation this suit is within the jurisdiction of the District Munsiff. Neither of the cases relied on by the Subordinate Judge, *Vasireddi Veeramma* v. *Butchiah*[1] and *Mallayya* v. *Jaganathamma*[2] are in point. *Vasireddi Veeramma* v. *Butchiah*[1], concerned a declaratory suit, and *Mallayya* v. *Jaganathamma*[2], was a claim for partition of property in joint possession. Both these cases are cases falling within Schedule II of the Court-Fees Act, *i.e.*, cases of fixed court-fees depending on the nature of the claim. They are of no assistance in considering a case like the present where under section 14 of the Madras Civil Courts Act, the value is to be ascertained in accordance with section 7 (v) of the Court-Fees Act. Accordingly the revision petition is allowed with costs.

B.V.V. *Petition allowed.*

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1. (1926) 52 M.L.J. 381 : I.L.R. 50 Mad. 646.
2. (1941) 2 M.L.J. 567.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Telikicherla Kandala Srimannarayana Charyulu .. *Appellant**

v.

Koyal Kandadai Bhavanacharyulu *alias* Modaliandan Swamuluvaru (deceased) and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 41, *rules* 23 *and* 27—*Additional evidence tendered to appellate Court —Remand on that ground—Legality—Duty of appellate Court.*

The mere fact that evidence was tendered before the appellate Court would not justify any remand of the case. The powers of the appellate Court to admit additional evidence in appeal are contained in Order 41, rule 27 of the Code. Under that rule whenever additional evidence is allowed to be produced by an appellate Court, it is bound to record its reasons for its admission. Further, the clauses (*a*), (*b*) and (*c*) of rule (1) must be considered to find out whether a case is made out for admitting additional evidence.

Appeal and petition against the order of the Court of the Subordinate Judge, Narasapur, dated 19th September, 1945, in A.S. No. 170 of 1943 (O.S. No. 3 of 1942, District Munsiff Court, Narasapur).

S. Venugopala Rao for Appellant.

A. M. Krishnaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The only ground on which the learned Subordinate Judge remanded the suit for a re-trial after framing additional issues is that contained in paragraph 5 of the judgment. He says :

" The evidence tendered by appellant in this Court is voluminous and consists of several very old documents and serious questions of custody, proof, admissibility and relevancy are hinted by the respondents. The appellate Court cannot continue the trial on these lines. I therefore remand the suit for fresh disposal in the light of the following directions."

In my view the mere fact that evidence was tendered before the appellate Court would not justify any remand of the case. The powers of the appellate Court to admit additional evidence in appeal are contained in Order 41, rule 27 of the Code of Civil Procedure as amended by this Court. Under that rule, whenever additional evidence is allowed to be produced by an appellate Court, the appellate Court is bound to record reasons for its admission. In this case the appellate Judge has overlooked the plain provisions of the Code and has remanded the suit merely because the appellant has tendered evidence. Further he has also to consider clauses (*a*), (*b*) and (*c*) of rule (1) and find out whether a case is made out for admitting additional evidence. There is no consideration of this question nor is there any finding by the learned appellate Judge.

It is contended on behalf of the respondents that there was a consent memo. filed by both parties on the 19th September, 1945, that is on the very date on which the judgment of the learned Subordinate Judge was pronounced ; but there is nothing in the judgment to show that the learned Judge remanded the suit because the parties consented to such a course. If the learned Judge intended to remand the case because the parties consented to such a course then he should have confined the trial after remand to the conditions specified in the memo. signed by the advocate for the respondents and the advocate for the appellant. The terms contained in the memo. are :

" (1) That the document tendered in the appeal by the appellant in I.A. No. 737 of 1943 may be received subject to their proof, relevancy and admissibility.

(2) That the further evidence in the trial Court be confined to the proof of the documents in the lower Court by the plaintiff and their rebuttal by the respondents.

(3) That the appellant pays all the costs incurred by the respondents up till now in the lower Court and the appeal irrespective of the result of the suit."

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*A.A.O No. 585 of 1945 and C.R.P. No. 1425 of 1945. 29th August, 1947.

The judgment and decree of the learned Subordinate Judge on appeal does not give any indication that the learned Judge intended to follow the terms of the consent memo. In these circumstances it is unnecessary to go into the question of the consent memo. In the result I allow the appeal, set aside the order of remand by the learned Subordinate Judge and direct the learned Subordinate Judge of Narasapur to restore the appeal to his file and dispose of it according to law. The respondents will pay the costs of the appellant in this Court. No leave.

C.R.P. No. 1425 *of* 1945.—The civil revision petition is filed in the alternative and it is unnecessary. Dismissed.

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

Panchaksharam Pillai ... *Petitioner**

v.

Rangaswami Pillai, trustee of Selva Vinayakar Koil Mutt at Tiruppuvanam and others .. *Respondents.*

Civil Procedure Code (*V of* 1908) *Order* 6, *rule* 17—*Amendment of plaint—Suit for possession of temple property transferred without authority—Amendment asking for cancellation of sale—If changes cause of action.*

A trustee of a temple filed a suit for recovery of possession of certain properties which he claimed to belong to the temple against the defendants to whom another trustee had purported to mortgage them without authority. He also asked for the cancellation of the mortgage. There was a decree, but it was set aside on appeal and the case remanded for trial with liberty to the defendants to file additional statements and permission to the plaintiff to amend his plaint by adding new parties, if any plea of non-joinder was raised by the defendants. The plaintiff added as defendants a subsequent vendee of the same properties from the same trustee who originally mortgaged them without authority and also his lessee. At the hearing, the plaintiff applied to amend his plaint by inserting a claim for cancellation of the sale deed in favour of such transferee and for possession against him and his lessee. On a contention that it should not be allowed as it had the effect of changing the cause of action,

Held, that the suit was to be regarded as one for possession of the properties and it was proper that the claim should be fully decided in these proceedings. Under the circumstances, it would be most improper to refuse the amendment asked.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Manamadura, dated 29th November, 1946, in I.A. No. 1023 of 1946 in O.S. No. 32 of 1945.

S. G. Rangaramanujam and *T. R. Kothandarama Mudaliar* for Petitioner.

K. S. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—The first respondent is a trustee of a temple and has filed the suit for recovery of possession of certain properties which he claims to belong to the temple. He filed the suit in December, 1944, against two persons (defendants 1 and 2) to whom another trustee purports to have mortgaged the properties. That mortgage was a possessory mortgage, dated 20th May, 1942 and accordingly the suit was one for possession against the two mortgagees. The first respondent asked also for cancellation of the mortgage on the ground that the trustee-mortgagor had no authority to effect it. The plaint was accepted and registered on the 13th January, 1945 and the defendants-mortgagees claimed that the mortgage was paid off before that date. In October, 1945, the suit was decreed in the respondent's favour. In March, 1945, the trustee who effected this mortgage (the fifth defendant) purported to sell this mortgaged property to the petitioner. There was an appeal to the Subordinate Judge's Court against the decree which was disposed of by consent. The decree was set aside and the case was remanded for trial. The order of remand directed that the defendants were to be permitted to file an additional written statement raising such other additional pleas as they may be advised

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*Civil Revision Petition No. 75 of 1947. 21st January, 1948.

and the plaintiff was to be permitted to amend his plaint by adding necessary parties, if any plea of non-joinder of the other trustee is taken by the defendants in their written statement. When the case came back to the trial Court the plaintiff joined the remaining trustees and also the present petitioner who it will be remembered claims to be a transferee from the fifth defendant-trustee. The plaintiff joined also the ninth defendant who claims to be a lessee from the petitioner, eighth defendant. The petitioner and the ninth defendant were joined because they claimed to have some interest in the property of which the plaintiff was claiming possession. The suit came on for hearing on the 13th and 14th of November, 1946 and on the 15th November, 1946, whilst the hearing was in progress the respondent filed an application to amend his plaint by inserting a claim for cancellation of the sale-deed in favour of the petitioner and for possession against the petitioner and the ninth defendant. The District Munsiff allowed this amendment.

The petitioner now applies under section 115 of the Civil Procedure Code and asks that the order may be reversed and the amendment disallowed. His case is that the amendment has the effect of changing the cause of action and that on that account it was not properly allowed. The District Munsiff has dealt with this point in his judgment. He takes the view that the suit is properly to be regarded as one for recovery of possession of properties belonging to the temple and, that being so, that it is proper that the respondent-plaintiff should have his claim fully decided in these proceedings. Otherwise the first respondent, after securing a decree, will be compelled to file another suit to give full effect to the claim which he is now making. Counsel for the petitioner of course relies on the dictum of Lord Buckmaster in the case in *Ma Shwe Mya* v. *Maung Mo Hnaung*[1]. He urges that the effect of this amendment is to substitute one distinct cause of action for another and to change the subject-matter of the suit. There might be some force in this contention if the original suit were properly to be regarded merely as one for cancellation of an instrument of mortgage. The amendment then would convert it into a suit for cancellation of a subsequent transfer of the same property. But like the District Munsiff I cannot regard the suit in this way. It is a suit for possession of that property. After it was filed the person who is alleged to have wrongfully parted with the possession makes another transfer of the same property and by so doing puts another obstacle in the way of the plaintiff. In these circumstances it would, I think, be most improper to refuse the amendment asked. The only effect of such a refusal would be to compel the plaintiff to file another suit and to delay him in securing a decision as to the right to possession which he claims. This is the view which has been arrived at by the District Munsiff and it is one with which I agree. Accordingly I consider that the amendment was properly allowed but in any event I am satisfied that there is no case shown here for interference under section 115 of the Civil Procedure Code. The petition is dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Janab E. M. Ghulam Dastagir Saheb .. *Petitioner**

v.

Marudai Pillai and another .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (xi) (cc)—Applicability —Suit by new tenant against landlord and old tenant—Court-fee payable—Basis—Government cist directed to be paid by tenant—Whether need be taken into account.

Section 7, clause (xi) (*cc*) of the Court-Fees Act is intended to enable a landlord to bring a cheap suit against a tenant guilty of holding over after the determination of his tenancy. The word

1. (1921) L.R. 48 I.A. 214 : I.L.R. 48 Cal. 832 (P.C.).

* Civil Revision Petition No. 1462 of 1947. 3rd November, 1947.

" landlord " in the clause should not be taken too literally. Where a new lessee of the property sues for recovery of possession of the property and impleads the landlord and the previous lessee whose lease had been terminated,

Held, that the suit was governed by clause (xi) (*cc*) of section 7 of the Court-Fees Act.

Held further, that for purposes of calculating court-fee under clause (xi) (*cc*) the Court should take into account only the rent payable to the landlord and not also the Government cist agreed to be paid by the tenant to the Government.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tanjore, dated 8th October, 1947, in O.S. No. 219 of 1947.

M. S. Venkatarama Aiyar and *K. V. Srinivasa Aiyar* for Petitioner.

A. V. Viswanatha Sastri for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was one of two defendants in a suit in the District Munsiff's Court, Tanjore, to eject him from possession of certain land. The second defendant in the suit was the Tanjore Municipal Council.

The first defendant had been for some years the holder of a lease, from the Council, of the land in question. It was a registered lease and valid in every respect. It came to an end by effluxion of time on 31st March, 1946. He had begun negotiations previously for renewal and by resolution, dated 16th January, 1946, the Council agreed to grant him a new lease for three years from 1st April, 1946 to 31st March, 1949. This resolution was confirmed by a Government memorandum, dated 21st May, 1946. Thereafter this Government order appears to have been cancelled and the Council believing that they had no authority to grant any lease to the petitioner, therefore determined to put up the lease of this land for auction in the ordinary way. On 12th April, 1947, the Council, having no doubt some previous knowledge of the ultimate intentions of the Government, informed the petitioner that he could not continue in possession after 30th June, 1947. At the public auction the plaintiff, respondent here, was successful and on 25th June, 1947, a lease for three years complying with all the formalities and to commence from the 1st July, 1947, was executed.

The position therefore was roughly this. The unfortunate petitioner by some unknown Governmental act had lost the opportunity of a renewal of his old lease and the equally innocent respondent by force of the above circumstances had acquired a lease to property which had been in the occupation of the petitioner for some years.

The new lessee on seeking to enter into possession found that the petitioner was there, despite the Council's notice and the fact that the old lease had terminated so far back as March, 1946. An application was therefore made by the new lessee to the Council in which he asked them to remove the petitioner and given him possession. I am told that the Municipality in reply told the new lessee that it was for him, if he liked, to take whatever legal action was necessary to eject the old lessee. He therefore filed the suit in question on 12th August, 1947, against the first defendant, the old lessee, and also against the Municipal Council who, I understand, have taken no helpful part whatever in the proceedings.

This petition arises under the Court-Fees Act. In the suit the plaintiff claimed at first that he could sue under section 7 (v). The first defendant however objected that if the market-value were taken, the suit would be beyond the jurisdiction of the District Munsiff. Thereupon the plaintiff successfully sought to amend the suit and to value it as being one not for possession, but as a suit between landlord and tenant under section 7 (xi) (*cc*).

In the lower Court when the propriety of this amendment was being discussed, it was argued on behalf of the plaintiff that he was in law an assignee of the reversion from the Council, the owner of the land, and as such could sue in the place of the landlord under section 109 of the T.P. Act. His contention was upheld.

The first defendant contended that even so under clause (xi) (*cc*) the valuation must be according to the amount of the rent payable for the year before the date of the plaint. In calculating that the fact that the lease from the Council contained an agreement by the tenant to pay not only the rent but Government cist also must be considered and the actual figure of the rent *plus* cist would exceed the jurisdiction of the District Munsiff's Court. The contention was rejected and the District Munsiff allowed the suit to be valued under clause (xi) (*cc*), a decision from which the first defendant now appears here in revision.

Mr. Venkatarama Ayyar who appears for the petitioner has argued with great force and so far as I am concerned with success that the basis put forward in the lower Court that the new lessee could be considered for the purpose of this case as an assignee under section 109 was wrong. In fact there is very little of his argument on this point with which I am in disagreement.

But I feel that there is really something more than this in the case. It is a matter arising out of the Court-Fees Act. One is not therefore concerned so much with the merits or demerits of the plaintiff's case but to see whether the action in its present form can be brought within the ambit of the section or sub-section which the plaintiff has selected. Section 7 (v) applies generally to suits for possession. The new clause, *viz.*, clause (xi) was meant to ease the position of a landlord endeavouring to obtain his rights as between himself and his tenant and of a tenant endeavouring to obtain his from the landlord and to give both a quick, easy and cheap remedy. If clause (v) were the only one to apply, it would involve very heavy court-fees. Sub-clause (*cc*) of clause (xi) was intended to enable a landlord to bring a cheap suit against a tenant guilty of holding over after the determination of his tenancy. That the word "tenant" must not be taken too literally is to be found in numerous cases including *Gobindakumar Sur* v. *Mohinimohan Sen*[1], *Manickam Pillai* v. *Ratnasami Nadar*[2] and the Privy Council case in the *Kannan Industrial Bank, Ltd.* v. *Satya Niranjan Shaw*[3]. Although their Lordships were dealing with the Calcutta Rent Act, the analogy is not too distant.

Leaving this particular question aside for the moment and going back to the main contention in the lower Court as to the right of the new lessee to sue, authorities going back to *Achayya* v. *Hanumantarayudu*[4], show that a person in the position of a lessee can sue in ejectment a person whom he finds in occupation of the land leased to him. In *Hakim Mohamad Fazihzzaman* v. *Anwar Husain*[5], a Bench decided that a lessee in circumstances similar to those of the present case was entitled to enforce his right to obtain possession of the land leased to him so that he might enjoy its usufruct, because section 108 of the Transfer of Property Act provides that a lessor is bound to put him in possession of the property and further that the benefit of the contract is annexed and goes with the lessee's interest as such, and can be enforced by him. Reference was made to *Achayya* v. *Hanumantarayudu*[4], where the right of a lessee to sue was assumed because he claimed under the owner of the property. In that case the plaintiff sought to obtain possession of land leased to him by defendant No. 1 under a registered cowle. It was admitted that defendant No. 1 was an agraharamdar and was the owner of the land. Defendant No. 2 pleaded that he had occupancy rights, but in the lower Court these were not satisfactorily proved. The lower appellate Court, however, held that the lessee was not entitled to sue because he was a mere lessee and the owner had not been in possession up to the date of the lease. As stated, this Court had no hesitation whatever in holding that as the owner of the land was entitled to eject the second defendant on proof of title, so could the lessee, claim under him to obtain possession on proof of such title and of his own lease. These two cases have been approved in many others (*see* Pollock's Transfer of Property Act, second edition, page 599). The new lessee, in my opinion in the case before me, could properly bring an action to eject the first defendant.

1. (1929) I.L.R. 57 Cal. 349.
2. (1917) 33 M.L.J. 684.
3. (1928) 55 M.L.J. 464 : L.R. 55 I.A. 344 : I.L.R. 56 Cal. 80 (P.C.).
4. (1891) I.L.R. 14 Mad. 269.
5. (1931) 30 A.L.J. 126.

Now, has he to bring this suit, as though it were an ordinary action for possession under section 7 (v) and value the suit on the market value of the property or may he, as the lessor could have done, take advantage of section 7 (xi) (*cc*) ? It would, in my opinion, be unjust to hold that he may bring the action only under the former clause. Where a person obtains a lease, say, of a dwelling house, from a lessor and finds when he desires to take possession that some stranger is there, it would be monstrous to make him file a suit on the basis that he was doing anything else but stand in the shoes of the lessor. If the landlord can bring the suit cheaply under clause (xi) (*cc*), why should not the lessee be entitled to do the the same ? If the word " tenant ", can be extended, as it has been extended by many different Courts, to include a person who is not in law a tenant at all, to say that the word " landlord " may cover a lessee who under section 106, Transfer of Property Act, has every legal right to pursue such a remedy, does not seem at all difficult. I think that the decision of the lower Court can be supported, although for different reasons. It would be in my opinion a most artificial approach to the Court-Fees Act to say that a valid lessee could only exercise his undoubted rights under section 108 of the Transfer of Property Act at great cost under section 7 (v) of the Court-Fees Act, while the landlord, if he chose to bring the same suit in ejectment, could avail himself of section (xi) (*cc*). I therefore hold that the latter clause applies in the circumstances of this case.

The next point relates to the question of rent. Clause (xi) refers to " the amount of the rent of immoveable property." Here, I understand, (no copy is before me), the lease clearly says that the lessee is to pay a certain rent and that in addition he is to be responsible for payment of Government cist. No doubt in section 105 of the Transfer of Property Act, " rent " means all payments which the tenant undertakes to make. Perhaps logically therefore, it may be argued that in the Court-Fees Act the word " rent " includes everything. To do so, however, I think, overlooks the fact that the clause (xi) (*cc*) was intended to give landlords and tenants and those claiming under them a cheap remedy. The words used are " the amount of the rent of the immoveable property." This is merely a rough and ready guide and in my opinion it would be against the intention of the Legislature to hold that into what was intended to be a rough and ready guide, the whole of the definition of section 105 of the Transfer of Property Act should be imported. In the agreement to pay the Government cist the amount is not mentioned. No doubt the amount varies rarely by more than a few rupees, but I cannot bring myself to find that when this section speaks of " rent " it means everything which the lessee agreed to pay, ascertained or ascertainable.

In the result, therefore, this petition is dismissed. The Council, as already stated, having refused to give any assistance to those unfortunate citizens, I think that the proper order to make about costs is to say that they will abide the result of the suit in the lower Court.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Jayaraman and others .. *Petitioners**

Criminal Procedure Code (V of 1898), sections 253, 435 and 436—Discharge of some accused and framing of charges against others—Proper time for agitating propriety of the order—Reasons for order of discharge—Stage, at which could be given.

Where a first information report is filed against a number of accused and the Magistrate after examining the prosecution witnesses discharges some of the accused and frames charges against the rest, the proper time at which the propriety of the discharge order can be agitated in revision is only after the Court has finally disposed of the matter. In such a case, it would not be proper for a Magistrate to express any definite opinion regarding the credibility of witnesses examined for the prosecution and he would be perfectly justified in not giving any reason for discharging the accused at that stage

*Crl.R.C. No. 544 of 1947. 20th February, 1948.
(Crl.R.P. No. 443 of 1947).

There is nothing in the language of section 253, Criminal Procedure Code, which precludes a magistrate from doing so. He is of course bound to give his reasons when he finally either acquits or convicts the other accused against whom the charges have been framed.

Govindaraj v. *Emperor*, 1938 M.W.N. 38, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional District Magistrate of North Arcot, dated the 28th day of March, 1947, and passed in C.R.P. No. 8 of 1947 (C.C. No. 201 of 1946, Additional 1st Class Magistrate of Tiruvannamalai.)

V. Rajagopalachari for *C. Deenadayalu* and *K. Raja* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following .

ORDER.—The First Information Report regarding the offences alleged to have been committed under sections 147, 148, 149 332, 224, 225, and 379 of the Indian Penal Code was filed against the 8 petitioners and 4 others before the Additional First Class Magistrate of Tiruvannamalai and after examining the witnesses for the prosecution the learned Magistrate discharged the 8 petitioners, who were accused 5 to 12, before him stating that no case which, if unrebutted, would warrant a conviction of these accused has been made out. As regards the other four he framed charges under various sections of the Code. At this stage the prosecution filed an application before the District Magistrate under sections 435 and 436 of the Criminal Procedure Code requesting that the order of discharge be set aside; the learned Additional District Magistrate in a brief order has set aside the order of discharge and directed the Additional First Class Magistrate to enquire into the matter afresh.

In my opinion, the proper time at which the propriety of a discharge like the one in question here, can be agitated in revision is only after the Court of enquiry or trial has finally disposed of the matter. It would not be proper for a Magistrate discharging some accused and framing charges against others to express any definite opinion regarding the credibility or otherwise of the witnesses examined for the prosecution. It may be that a Magistrate may be inclined to believe the evidence as against some of the accused and not believe the same as regards the others. It is very embarrassing for a Magistrate to give reasons at such a stage and therefore the Court of First Instance, in this case, was perfectly justified in not giving any reason for discharging the accused at that stage. Of course he is bound to give his reasons when he finally either acquits or convicts the other accused persons against whom charges have been framed. In a similar case in *Govindaraj* v. *Emperor*, Venkataramana Rao, J., has laid down that it would be competent to a Magistrate to discharge some accused and frame charges against others without giving any reasons. Till the charge against the remaining accused is disposed of by a final order the trial Court should be deemed to be in seisin of the whole case and so long as it is in charge thereof the reasons in regard to the order of discharge can be given at the final stage. There is nothing in the language of section 253, Criminal Proeedure Code which precludes the court from doing so. The learned Judge further goes on to observe :

> "Of course the language of the section would plainly indicate that a Magistrate should give his reasons at the time he pronounces the order of discharge and if it is the final order in the case, he is bound to give his reasons. The moment he pronounces the final order, he becomes *functus officio* and he is no longer in charge of the case. But in a case of this nature (where the charges have been framed in the case of some) I am inclined to think that he has not become *functus officio* and it would be open to him to defer his reasons".

I am in entire agreement with the observations made by the learned Judge. I would therefore hold that the Additional District Magistrate was not justified in setting aside the order of discharge in the present case.

As a matter of practice and convenience it would always be better if the applications by the prosecution for setting aside orders of discharge in cases where charges

1. 1939 M.W.N. (Crl.) p. 14 : 1938 M.W.N. 38.

have been framed against some of the accused alone, or against all the accused under some sections alone, were made only after the Court finally disposes of the matter. In this case, the First Class Magistrate is bound to give reasons when he finally disposes the case against the other accused persons and if the reasons are not sufficient or acceptable the prosecution may, then, move the District Magistrate for such orders as he thinks fit. Interfering at this stage makes the Court acting under sections 435 and 439, Criminal Procedure Code, more like a Court of of appeal than like a Court of revision because it has to go into the entire evidence as if it were an appeal before setting aside an order of discharge. Such a Procedure is not contemplated by the Code at all. The order of Additional District Magistrate is set aside.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice*, AND MR. JUSTICE SATYANARAYANA RAO.

V. Gurulinga Mudaliar .. *Appellant.**

v.

Thayyanayaki Ammal .. *Respondent.*

Succession Act (XXXIX of 1925), section 375 (1)—Security—When could be ordered to be furnished—Hindu widow to whom succession certificate has been granted in respect of debts due to her husband—Presumptive reversioner, if can insist that security should be ordered to be furnished.

Under section 375 (1) of the Succession Act, the District Judge is bound to require, as a condition precedent to the grant of a certificate, that the person to whom the grant is being made should furnish security in cases coming under sub-section (3) and sub-section (4) of section 373. In any other case, the District Judge has got a discretion which is implied in the use of the word " may ".

Where Succession Certificate has been granted to a Hindu widow in respect of the debts due to her husband, it is doubtful whether section 375 (1) of the Succession Act could be availed of by the presumptive reversioner who has no present interest in the whole or any part of those debts so as to insist upon security being ordered to be furnished. The widow is under no duty to render an account to any one, least of all to the presumptive reversioner. There is no right of indemnity in a reversioner in respect of the property which devolves on a Hindu widow.

(Obiter).—Section 375 (1) does not empower the Court to require a Hindu widow to furnish security at the instance and for the benefit of a presumptive reversioner for the debts and securities in respect of which a Succession Certificate has been granted to her.

Ligamma v. *Venkayya*, (1944) 1 M.L.J. 288, doubted.

The presumptive reversioner has always a right of suit under the Hindu Law in cases of waste committed by the widow for an injunction to restrain the committing of waste on her part.

On appeal from the order and judgment of Chandrasekhara Aiyar, J., dated 7th August, 1947, in the Original Testamentary Jurisdiction of the High Court in O.P. No. 174 of 1947.

N. K. Mohanarangam Pillai and *M. V. Gopalaratnam* for Appellant.

A. Seshachariar and *K. Raghavan* for Respondent.

The judgment of Court was delivered by

The Officiating Chief Justice.—This is an appeal against the order of Chandrasekhara Aiyar, J., granting Succession Certificate to the respondent in respect of certain debts due to her deceased husband without furnishing any security. The appellant is the presumptive reversioner, the son of a divided brother of the deceased. The complaint of the appellant is that the respondent should have been directed to furnish security under section 375 (1) of the Indian Succession Act. The learned Judge referred to the decision of a Division Bench of this Court in *Ligamma* v. *Venkayya*[1], in which Mockett and Bell, JJ., held that when a widow applied for the issue of a Succession Certificate in respect of a sum of money due to her deceased husband's estate the widow would be entitled to a certificate without security in the absence of special circumstances. The appellant complains that

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* O.S.A. No. 69 of 1947. 3rd February, 1948.

1. (1944) 1 M.L.J. 288.

there were special circumstances which would justify an order for security but the learned Judge did not consider them before dispensing with security.

Under section 375 (1), the District Judge is bound to require, as a condition precedent to the grant of a certificate, that the person to whom the grant is being made should furnish security in cases coming under sub-section (3) and sub-section (4) of section 373. In any other case, the District Judge has got a discretion which is implied in the use of the word "may." It was evidently assumed by the learned Judges who decided the case in *Ligamma* v. *Venkayya*[1], that when a certificate was granted to a Hindu widow in respect of her husband's debts or securities, the Court may, when there were sufficient circumstances, require her to furnish security, and that such an order might be made at the instance of a reversioner. With great respect to the learned Judges, we doubt if the provision in section 375 (1) could be availed of by a presumptive reversioner who has no present interest in the whole or any part of the debts and securities covered by the succession certificate granted to a widow. The widow is under no duty to render an account to any one, least of all to the presumptive reversioner. There is no right of indemnity in a reversioner in respect of property which devolves on a Hindu widow. The reversioner is in no sense entitled to the whole or any part of the debts and seeurities comprised in the estate of the last maleholder, in the hands of the widow. We are inclined to hold that section 375 (1) does not empower the Court to require a Hindu widow to furnish security for debts and securities in respect of which a succession certificate is granted to her at the instance and for the benefit of a presumptive reversioner.

We, however, need not finally decide this point, as we are convinced that in this case there are no circumstances, special or otherwise, to justify an order for security. The only circumstances relied upon by the appellant are that the estate of the deceased last male owner consisted mostly of cash and valuable securities and there were no liabilities and that besides the amounts covered by the succession certificate there are other valuable assets of the deceased which might come into her hands and that a petition for Letters of General Administration was more appropriate than a petition for a succession certificate. In paragraph 5 of the counter-affidavit he states that the widow should be directed to give security before she could be authorised to handle the specified or other assets and thereby the interest of the reversion should be safeguarded. None of these circumstances affords a sufficient ground for demanding security from the widow. The Hindu law provides for a right of suit to the presumptive reversioner in cases of waste committed by the widow for an injunction to restrain the committing of waste on her part. Otherwise, the widow is not under any disability in respect of the property to which she succeeds on her husband's death. Actually the appellant instituted a suit, C.S. No. 228 of 1946, in this Court, for an injunction to restrain the widow from committing waste, but that suit was dismissed. There was an appeal but that appeal also failed, because the appellant would not comply with an order of this Court to furnish security for the costs.

There are no merits in this appeal which is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SATYANARAYANA RAO.

Jasti Basavayya and others .. *Appellants**.

v.

Lingam Raghavayya and others .. *Respondents.*

Legal Practitioners Fees Rules, rule 33—Junior's fee—Conditions necessary for allowing—Junior counse passing away after framing of issues—Fee whether allowable to another junior counsel coming in thereafter.

The fee payable to a junior counsel in a case under Rule 33 of the Legal Practitioners Fees Rules must be to the junior who was on record at least on the date of the settlement of the issues.

1. (1944) 1 M.L.J. 288

*Appeal No. 550 of 1945. 26th September, 1947.

Where in a case two counsel appeared, a senior and a junior, but the junior died after the framing of the issues and another junior counsel was substituted in his place, no fee would be allowable for the junior counsel under rule 33 of the Legal Practitioners Fees Rules. The Court cannot give effect to the spirit of the rule overlooking its clear language.

It is a matter for the Rule Committee to make suitable amendment to the rule to cover cases of this description.

Appeal against the amended decree of the Court of the Subordinate Judge of Tenali, dated 28th June, 1945 in O.S. No. 55 of 1943.

K. Kottayya for Appellant.

Ch. Raghava Rao for Respondent.

The judgment of the Court was delivered by

Satyanarayana Rao, J.—This is an appeal by defendants 1 to 9 against the amended decree disallowing the junior counsel's fee of Rs. 62-5-4 to the appellants and refusing to allow Rs. 270 as senior's fee instead of Rs. 187. Defendants 1 to 9 were represented in the suit by a senior counsel assisted by a junior; but unfortunately that junior died after the framing of the issues and the defendants engaged another junior. The decree as originally drafted allowed a sum of Rs. 62-5-4 for the junior pleader and Rs. 187 for the senior pleader. Defendants 1 to 9 made an application for amending the decree by allowing a sum of Rs. 270 for the senior and Rs. 90 for the junior. The application was opposed by the second plaintiff. The learned Subordinate Judge, while finding that the appellants were entitled to Rs. 270 for the senior as the other defendants 18 and 20 to 22 were not entitled to any costs since they were also equal reversioners along with the plaintiffs and supported them, did not carry out the result of this finding in the amended decree. In this we think he is wrong and the learned advocate for the respondents concedes that the appellants are entitled to Rs. 270 as senior's fee instead of Rs. 187. We think therefore that the decree ought to be amended so far as this amount is concerned.

As regards the junior's fee, the petition itself was made under a mistake as apparently it was not noticed by the counsel for defendants 1 to 9 that as a matter of fact junior's fee of Rs. 62-5-4 was allowed in the original decree. When the complaint about the junior's fee was raised by the petition for amendment the learned Subordinate Judge discovered that it was a mistake to have allowed the junior's fee in the first instance as under rule 33 of the Practitioners Fees Rules, on the facts of this case the appellants were not entitled to the junior's fee. The junior to whom the fee was payable was not the junior on record at the time of the framing of the issues. We think that the construction placed by the learned Subordinate Judge on rule 33 of the Practitioners Fees Rules is correct. No doubt the object of the rule is to prevent a litigant from claiming the junior's fees by merely engaging him at the last hour and to see that a junior is engaged from the beginning of the case to claim the benefit of the rule. The rule is as follows:

"In Courts subordinate to the High Court, when the amount or value of the claim in a suit or appeal exceeds Rs. 1,000 an additional fee calculated at one third the fee allowable under rules 31 and 32 above shall be payable to a junior practitioner engaged with a senior practitioner, provided that the junior was on record from at least the date of the settlement of issues in a suit or from the date fixed for the appearance of the respondent in an appeal."

The language of the rule is clear. The fee payable to a junior must be to the junior who was on record at least on the date of the settlement of issues. In this case as stated already the junior on record was not the junior at the date of the settlement of the issues. Therefore no fee would be allowable under rule 33. We are therefore unable to agree with the contention of the learned advocate for the appellants that we should give effect to the spirit of the rule overlooking the clear language. It is a matter for the Rule Committee to make suitable amendment to the rule to cover cases of this description. We have no option but to give effect to the plain language of the rule. The contention of the appellants has therefore to be rejected.

In the result the decree of the lower Court will be modified to the extent indicated above and in other respects the appeal is dismissed but without any order as to costs.

K.C. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL, AND MR. JUSTICE GOVINDARAJACHARI.

Pulla Subbaramiah .. *Appellant.**

v.

Palagari Balarami Reddy and others .. *Respondents.*

Civil Procedure Code (V of 1908), *sections* 47 *and* 96 *and Provincial Insolvency Act (V of* 1920), *sections* 37 *and* 68—*Decree against insolvent and two others—Annulment of adjudication and vesting of insolvent's property in Official Receiver under section* 37 *of the Provincial Insolvency Act. Petition to execute decree against person of insolvent and property in the hands of the Official Receiver—Order directing execution to proceed—Appeal by insolvent—Maintainability.*

The appellant was adjudicated an insolvent and nearly four years later the adjudication was annulled and his properties were vested in the Official Receiver by an order under section 37 of the Provincial Insolvency Act. An execution petition was filed against the appellant and two others in execution of a decree in a suit in which all the three were the defendants. The Official Receiver was added as the fourth respondent. The prayers in the execution petition were to attach and sell certain immoveable properties of the appellant which vested in the Official Receiver under section 37 of the Provincial Insolvency Act and also that a warrant may be issued for the arrest of the appellant. Though a counter affidavit was filed by the appellant execution was ordered to proceed. On a question whether, the insolvent whose adjudication had been annulled could maintain an appeal against that order,

Held, that as the decree-holder chose, to make the insolvent a party to the execution petition not only in respect of the prayer for his arrest but also in relation to the prayer for the attachment of his property which had vested in the Official Receiver, there is no reason why the insolvent, a party to the decree sought to be executed, should not have a right to file an appeal against the order made in execution of the decree.

Case law fully discussed.

Appeal against the order of the Court of the Subordinate Judge of Nellore, dated 23rd April, 1945, in E.P. No. 98 of 1943 in O.S. No. 72 of 1929.

K. Krishnamurthi for Appellant.

K. Umamaheswaram and *P. S. Raghavarama Sastri* for Respondents.

The judgment of the Court was delivered by

Govindarajachari, J.—This is an appeal by the second defendant in O.S. No. 72 of 1929 on the file of the Court of the Subordinate Judge of Nellore, against the order in E.P. No. 98 of 1943. The decree was a money decree against the appellant and two others who were defendants 1 and 3 in the suit. The appellant was adjudged an insolvent on 12th April, 1933, in I.P. No. 82 of 1932, on the file of the District Court of Nellore. The adjudication was annulled on the 8th July, 1937, but the properties were vested in the Official Receiver, Nellore, by an order under section 37 of the Provincial Insolvency Act. The execution petition out of which this appeal has arisen was first filed against the three defendants. The Official Receiver was subsequently added as the fourth respondent. The prayer in the execution petition so far as the appellant was concerned was two-fold. One was that certain

> " immoveable property which belongs to the second defendant and which is vested in the fourth defendant under section 37 of the Provincial Insolvency Act in I.P.No. 82 of 1932 on the file of the District Court"

be caused to be attached and sold. The other was that a warrant should issue for the arrest of the second defendant under section 55 of the Code of Civil Procedure. The appellant filed a counter-affidavit in which he objected to the execution *inter alia* on the ground that the execution of the decree was barred by limitation, and that the amount had, in any event, to be scaled down under Madras Act IV of 1938. The Subordinate Judge made a short order in the following terms :

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*A.A.O. No. 448 of 1945. 17th September, 1947.

"Official Receiver in person says that he has no counter. Therefore execution will proceed. As it is, there is no prayer in the execution petition as against second defendant and hence the objections raised by second defendant need not be considered. The prayer is against Official Receiver alone, who is not contesting."

A preliminary objection is taken by the respondent's counsel that the appeal is not maintainable. It may at the outset be pointed out that so far at least as the prayer for the arrest of the appellant is concerned the appellant has undoubtedly a right of appeal. This is not contested by the respondent's counsel, but it is said that the question whether a warrant for the arrest of the appellant should issue or not does not arise at this stage and that all that has been decided by the order under appeal is that execution should proceed against the property of the appellant which is vested in the Official Receiver and that the other prayer or prayers in the execution petition must be taken to have been left over for future decision. There is no doubt some ambiguity in the judgment of the Subordinate Judge particularly when it is read in the light of the decretal order which was drawn up. It is obvious, however, that the Subordinate Judge was clearly in error in stating that there is no prayer in the execution petition as against the second defendant. It is on this ground that the Subordinate Judge held that the objections raised by the second defendant need not be considered. It will be noticed that the objections raised by the second defendant, if valid, will affect not only the execution of the decree by arrest but also the execution of the decree against his property vested in the Official Receiver. To say the least, we consider the order of the Subordinate Judge avoiding a consideration of the objections raised by the second defendant to be most inadvisable.

The question, however, on which there was considerable discussion before us was as to whether the appellant can maintain the appeal in respect of the order directing execution to issue against the property. Respondent's counsel relied upon the decision in *Sakhawat Ali* v. *Radha Mohan*[1], *Hari Rao* v. *Official Assignee, Madras*[2], and *Venkataramanayya* v. *Bangarayya*[3]. The first of these arose under the Provincial Insolvency Act of 1907. In the course of certain proceedings in insolvency before a District Judge the insolvent filed an application in Court complaining of a sale of property which had been held by the Receiver and urging that it should not be confirmed. The objection having been disallowed and the sale confirmed, the insolvent appealed to the High Court. It was held that he was not a "person aggrieved" within the meaning of section 22 or section 46 of the Provincial Insolvency Act of 1907 and could not therefore maintain either the application or the appeal. It was observed that he could not be aggrieved in the legal sense of the word by the sale of property in which he had no interest. The leading English cases of *Ex parte Sheffield*[4], and *In re Leadbitter*[5], were referred to, and it was pointed out that the possibility of a surplus being left for the insolvent after distribution, does not clothe him with any legal interest and that he has merely a hope or expectation. It may incidentally be noted that sections 68 and 75 of the Provincial Insolvency Act of 1920, corresponding to sections 22 and 46 of the Provincial Insolvency Act of 1907, have expressly named the insolvent among the persons who have the right to make an application under the former section and the right to file an appeal under the latter.

Hari Rao v. *Official Assignee, Madras*[2], arose under section 8 (2) of the Presidency Towns Insolvency Act (III of 1909). The facts in that case were similar to those in *Sakhawat Ali* v. *Radha Mohan*[1]. Following *Ex parte Sheffield*[4], *In re Leadbitter*[5], and *Sakhawat Ali* v. *Radha Mohan*[1], it was held that,

"an insolvent whose estate has vested in the Official Assignee is not entitled to appeal as an 'aggrieved person' within section 8 (2) of the Presidency Towns Insolvency Act against an order of a Judge rejecting his opposition to a sale of his estate by the Official Assignee."

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1. (1918) I.L.R. 41 All. 243.
2. (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F.B.).
3. (1934) 67 M.L.J. 942.
4. (1879) 10 Ch.D. 434.
5. (1878) 10 Ch.D. 388.

It was stated that the insolvent has no legal right to interfere with and embarrass the administration of the estate. It is of some significance that the Full Bench refrained from deciding whether an insolvent could maintain an appeal against an order admitting proof of a creditor to which he had objected.

In *Venkataramayya* v. *Bangarayya*[1], it was held under the Provincial Insolvency Act of 1920, that,

> " an insolvent whose estate is vested in the Official Receiver is not entitled to appeal against an order of a Judge rejecting his opposition to a sale of his estate by the Official Receiver."

Sakhawat Ali v. *Radha Mohan*[2], *Hari Rao* v. *Official Assignee, Madras*[3], *Ex parte Sheffield*[4], and *In re Leadbitter*[5], were referred to and followed. It is curious, however, that no reference was made to the altered language of sections 68 and 75-the object of which was evidently to enable the insolvent to make an application or file an appeal in the circumstances mentioned in those sections..

On behalf of the appellant it is first argued that the present case stands on a somewhat different footing because of the annulment of the order of adjudication and the vesting of the properties in the Official Receiver in pursuance merely of an order under section 37, and reference is made to *Veerayya* v. *Srinivasa Rao*[6]. When adjudication is annulled but the properties are vested in the Official Receiver, it cannot, no doubt, be said that the Insolvency proceedings continue for all purposes, and as pointed out in the decision cited, it cannot be said either, that the subsequent proceedings are not proceedings in Insolvency at all. It may be that an Official Receiver in whom the properties are vested by an order under section 37 cannot initiate proceedings under section 53 or section 54 of the Provincial Insolvency Act, but with regard at any rate, to property the ostensible legal title to which continues to be, apart from the Insolvency, in the debtor, the vesting in the Official Receiver by an order under section 37 must, for the present purpose, be taken to have the same effect as the vesting in him under section 28.

The principal argument of the appellant's counsel is based on the decision in *Kondapalli Tatireddi* v. *Ramachandra Rao*[7], *Swaminatha Odayar* v. *Kalyanarama Aiyangar*[8], *Subbaroya Goundan* v. *Virappa Chettiar Bank*[9] and *Manthiri Goundan* v. *Arunachalam Goundan*[10]. In *Kondapalli Tatireddi* v. *Ramachandra Rao*[7], the judgment-debtor applied to set aside a Court auction sale under Order 21, rule 72 of the Code of Civil Procedure. The application was rejected and he filed an appeal. The question was whether he was competent to prosecute it though he had become an insolvent. It was held that the correct principle was that,

> " a person who is a party to a suit or other proceeding in his own right does not become disentitled to continue to represent the interest merely because, in the course of the proceedings, his right has devolved on another by act of parties or by operation of law."

and that consequently no objection could be entertained against the validity or the prosecution of the appeal by the insolvent. In *Swaminatha Odayar* v. *Kalyanarama Aiyangar*[8], Sundaram Chetti, J., held that a judgment debtor who is adjudged insolvent and whose property is vested in the Official Receiver is a person " whose interests are affected " by a Court auction sale within the meaning of Order 21, rule 90 of the Civil Procedure Code and that he can therefore apply to set it aside. *Hari Rao* v. *Official Assignee, Madras*[3], was referred to and distinguished as a case which turned on the construction of the expression "aggrieved." *Kondapalli Tatirreddi* v. *Ramachandra Rao*[7], was referred to and followed.

In *Subbaroya Goundan* v. *Virappa Chettiar Bank*[9], one of the questiosns referred to the Full Bench was,

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1. (1934) 67 M.L.J. 942.
2. (1918) I.L.R. 41 All. 243.
3. (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F.B.).
4. (1879) 10 Ch. D. 434.
5. (1878) 10 Ch. D. 388.
6. (1935) 69 M.L.J. 364 : I.L.R. 58 Mad. 908 (F.B.).
7. (1921) 13 L.W. 616.
8. (1933) 65 M.L.J. 359.
9. (1933) 65 M.L.J. 719. (F.B.)
10. (1940) 1 M.L.J. 711.

"Has the judgment-debtor who has been adjudicated an insolvent right to prefer an appeal against an order dismissing an application put in by him under O. 21, rule 90 in the course of the execution of the decree passed against him?"

The question was answered in the affirmative. Here again *Kondapalli Tatireddi* v. *Ramachandra Rao*[1] was referred to with approval, and reference was made to *Ramachandra* v. *Shripati*[2], which followed it. How the Full Bench in *Subbaraya Goundan* v. *Veerappa Chettiar Bank*[3], distinguished the earlier Full Bench decision in *Hari Rao* v. *Official Assignee, Madras*[4], is worthy of note. Referring to *Hari Rao* v. *Official Assignee, Madras*[4], they said:

". . . . . . In that case the Full Bench question arose under the Insolvency Act and the decision therefore cannot be considered, as observed in the order of reference, as a direct authority on the position of an insolvent preferring an appeal against an order in execution of a decree passed against him under the Civil Procedure Code."

Subbaraya Goundan v. *Veerappa Chettiar Bank*[3], was followed in *Manthri Goundan* v. *Arunachala Goundan*[5]. After a review of the case-law it was held in the latter decision that the words,

"Whose interests are affected by the sale"

in Order 21, rule 90 must be construed in the ordinary sense and that,

"It is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication."

Hari Rao v. *Official Assignee, Madras*[4] and *Venkataramayya* v. *Bangarayya*[6] were distinguished as cases which were not concerned with the words found in Order 21, rule 90 but with the word "aggrieved" found in the Insolvency Acts.

It has been argued by the appellant's counsel with considerable plausibility that if an insolvent is a person whose interests are affected by the sale and could, therefore, maintain an application under Order 21, rule 90 of the Civil Procedure Code it would follow that he has sufficient interest to object to the sale itself and to file an appeal against an order overruling his objection.

It cannot be denied that if the lines of reasoning in *Subbaraya Goundan* v. *Veerappa Chettiar Bank*[3] and *Hari Rao* v. *Official Assignee, Madras*[4] are pursued to their logical extent, they may not altogether be reconcilable.

There is, however, in our opinion, a shorter answer to the question that has now been raised. Whether a person has a right of appeal or not will depend on the language of the statutory provision on which the appeal is based. As pointed out in *Subramania Iyer* v. *Valliamma*[7], in dealing with section 68 of the Provincial Insolvency Act, if a right to make an application or a right to file an appeal is conferred by the section on an insolvent, that right cannot be taken away because the property of the insolvent is vested in the Official Receiver or the Official Assignee. Under section 47 of the Civil Procedure Code,

"all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree."

In the present execution petition no doubt we have both the second defendant who was a party to the suit and the Official Receiver, who is "his representative." Under section 2, sub-section 2, an order under section 47 is a decree, and section 96 (1) provides that an appeal shall lie from every decree passed by any Court,

"save where otherwise expressly provided in the body of this Code or by any otherlaw for the time being in force."

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1. (1921) 13 L.W. 616.
2. A.I.R. 1929 Bom. 202.
3. (1933) 65 M.L.J. 719 (F.B.).
4. (1926) 50 M.L.J. 58 : I.L.R. 49 Mad. 461 (F.B.).
5. (1940) 1 M.L.J. 711.
6. (1934) 67 M.L.J. 942.
7. (1945) 1 M.L.J. 315.

Section 96 does not refer to or enumerate the persons who can file the appeal; but there is no ground for depriving a person who is a party to the decree of his right to appeal therefrom. The decree-holder chose to make the insolvent a party to the execution petition not only in respect of the prayer for his arrest but also in relation to the prayer for the attachment and sale of his property which had vested in the Official Receiver. That being so, there is, in our opinion, no reason why the insolvent should not have a right to file an appeal against the order made in the execution petition. We therefore hold that the appeal by the insolvent is competent.

In the view we have taken, it cannot be denied that the second defendant who is a party to the execution petition must be heard in support of his objections. As they have not been dealt with, the order of the lower Court will be set aside and the execution petition remanded for disposal according to law. Costs of this appeal will abide and follow the result.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

P.L.N.K.M. Nagappa Chettiar .. *Appellant**

v.

P.L.N.K.M.L. Lakshmanan Chettiar (dead) and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Execution petition—Parties reporting matter as "settled" in terms of compromise—Final order if passed—Application to revive competent only when there is no final disposal of former petition—Civil Procedure Code (V of 1908), section 42—Transferee Court having seisin of execution—Application made to Court passing decree—Effect.

The words "final order" in Article 182 (5) of the Limitation Act imply that the proceeding has terminated so far as the Court passing it is concerned. An application to revive or continue an execution petition will lie only when the former petition has not been disposed of finally. Where the order was made on the memorandum of consent which was signed by the parties and their advocates and the formal order of Court recited that the execution petition came before the Court to be mentioned as "settled",

Held, that there was a final disposal of the execution petition and that the inclusion in the order of such words as "dismissal" or "final disposal" were quite unnecessary.

Sundaramma v. *Abdul Khadar*, (1932) 64 M.L.J. 664 : I.L.R. 56 Mad. 490 (F.B.); *Rama Reddi* v. *Motilal Daga*, I.L.R. (1938) Mad. 326 and *Chidambaram* v. *Murugesan*, (1939) 2 M.L.J. 774 : I.L.R. (1940) Mad. 60, referred to.

While an application can always be made to the Court which passed the decree for an order for re-transferring it and such an application is a step-in-aid of execution and prevents limitation running against the decree-holder, nevertheless a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings; and in such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or unless the proceedings in the Court to which the decree was sent has been stayed for the purpose of executing the decree in the first Court.

Nagi Reddi v. *Kotamma*, (1947) 1 M.L.J. 156, referred to.

On appeal from the order of the Hon'ble Mr. Justice Kunhi Raman, dated 26th February, 1947 and passed in Application Nos. 2168 and 2169 of 1946 in E.P. Nos. 126 and 148 of 1946 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.S. No. 112 of 1934 on the file of the Court of the Subordinate Judge of Devakottah.

V. S. Rangachari for Appellant.

A. V. Viswanatha Sastri and *A. M. Krishnaswami Aiyangar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal by the judgment-debtor against the order of Kunhi Raman, J., who reversing the order of the learned Master, held that E.P.

* O.S.A. No. 23 of 1947. 27th November, 1947.

Nos. 126 and 148 of 1946 on the file of this Court are not barred by limitation and directed that the relief sought by the two petitions should be granted.

The circumstances are somewhat complicated, but reference will be made only to the relevant facts.

On 25th March, 1935, the respondent-decree-holder obtained a money decree against the appellant judgment-debtor in O.S. No. 112 of 1934 in the Court of the Subordinate Judge of Devakottah.

In C.S. No. 196 of 1933 in this Court the appellant sued a Chetty firm in respect of an advance of Rs. 11,250 made in 1916 out of a family trust fund in which the respondent and the appellant are interested; the claim made was for about Rs. 50,000, including principal and compound interest; the suit was dismissed in the trial Court but was decreed in the appellate Court; and an appeal to His Majesty in Council by the Chetty firm was rejected. By 1941 in respect of that decree, a sum of about Rs. 70,000 had been paid into this Court by the Chetty firm, being as to, about, Rs. 65,000, the judgment-debt and the balance for taxed costs. The appellant claimed to be entitled to all the costs to which he had been put, which he alleged amounted to over Rs. 13,000, as well as to the taxed costs Rs. 4,146-8-11. He contended that he should be recouped his total expenditure and that the difference between the amount of taxed costs and the total costs should be allotted to him out of the sum of Rs. 65,000 which undoubtedly, and he did not suggest to the contrary, was money belonging to the trust.

On the 26th March, 1941, the respondent caused his decree in O.S. No. 112 of 1934 in the Devakottah Court to be transferred to this Court for execution and on the 4th August, 1941, he issued E.P. No. 173 of 1941 for execution of that decree, after it had been transferred. By that date the amount due to the respondent under the decree was Rs. 12,753-3-3. The relief sought by the execution petition was the attachment of that sum out of the amount of Rs. 70,000 in Court in respect of C.S. No. 196 of 1933, on the ground that the appellant, as the decree-holder in that suit, was entitled to be reimbursed and paid Rs. 13,000 from and out of the moneys in Court. By 1943, the Hindu Religious Endowments Board had been approached to settle a scheme in respect of the money in Court belonging to the family trust. Application No. 217 of 1942 was issued in that behalf and was directed to be heard with E.P. No. 173 of 1941. On the 3rd February, 1943, the E.P. and the application were posted for being mentioned as settled, as recited in the formal order of this Court. At the hearing, learned counsel appeared respectively for the respondent-decree-holder, appellant-judgment-debtor and the Board. Out of the total sum in Court, credited to C.S. No. 196 of 1933, was a sum of Rs. 4,146-8-11 the amount of the taxed costs, which sum undoubtedly was due to the appellant. As mentioned he was claiming further sums for his out-of-pocket expenses and for costs which had not been allowed on taxation against the Chetty firm and that the difference should come out of the Rs. 65,000 balance. The Hindu Religious Endowments Board in addition to framing a scheme were also to decide how much of that sum should be paid to the appellant so as to reimburse him the amount of additional costs which he was seeking to be recouped. At the hearing on the 3rd February, 1943, a memorandum of consent, signed by all the parties and their respective advocates and by the advocate appearing for the Board, was filed and it was by consent ordered that,

(1) out of the sum of Rs. 4,146-8-11 the Registrar do pay

(*a*) Rs. 2,450 to the respondent in part satisfaction of his decree in O.S. No. 112 of 1934,

(*b*) Rs. 1,396-8-11 to the advocate for the appellant, and

(*c*) Rs. 100 each to the three sets of advocates appearing for the respondent, the appellant and the Board for their costs of the petitions;

(2) the above payments should be without prejudice to the rights, if any, of the parties to the trust funds of Rs. 65,000 which had been invested in the name of the Registrar;

(3) the said funds should remain in Court and the rights of the parties thereto should be worked out in appropriate proceedings separately.

No application was made and no order was passed in E.P. No. 173 of 1941 for attachment, as was sought in the petition.

Thereafter the respondent made no application to re-transfer his decree to the Devakottah Court and it remained in the custody of the High Court, which Court was not asked to give and it did not therefore furnish to the Devakottah Court a certificate of part satisfaction pursuant to section 41 of the Code.

Although the decree was still in the High Court, not having been re-transferred to the Devakottah Court, on the 18th January, 1946, within three years from the order made on the 3rd February, 1943, in E.P. No. 173 of 1941, the respondent issued E.P. No. 77 of 1946 in the Devakottah Court for attachment of the appellant's moveables in execution of his decree in O.S. No. 112 of 1934.

On the 25th June, 1946, after the expiration of three years from the date of the order in E.P. No. 173 of 1941, the respondent issued E.P. No. 126 of 1946 in this High Court for execution of the Devakottah decree, which was still in this Court. In the tabular statement it is stated that E.P. No. 77 of 1946, filed on the 18th January, 1946, is the date of the process for the last order of execution against the judgment-debtor. No reference is made in the tabular statement to the order in E.P. No. 173 of 1941 as the last order made in execution. The relief claimed is for attachment of a cheque for Rs. 13,203-5-0 directed to be issued to the appellant.

On the 2nd August, 1946, the respondent issued another execution petition in this Court, E.P. No. 148 of 1946, in which regarding the date of the last order of execution, column 2 of the tabular statement, gives E.P. No. 173 of 1941 in which Rs. 2,450 was realised and in which no final order had been passed and, also, E.P. No. 77 of 1946 filed on the 18th January, 1946, in the Devakottah Court which, it is stated, was dismissed on the 26th July, 1946. There these two execution proceedings are relied upon as bringing E.P. No. 148 of 1946 within the statutory limitation period. The relief claimed is that E.P. No. 173 of 1941, which, it is said, had not been finally disposed of should be revived and continued and that the sum of Rs. 13,203-5-0 lying in Court to the appellant's credit and the cheque for that sum should be attached.

Article 182 (5) of the Limitation Act provides a limitation period of three years for the execution of a decree, calculated from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree. The contention for the respondent is that the order made on the 3rd February, 1943, in E.P. No. 173 of 1941, was not a final order and that the petition did not proceed to final disposal and was still subsisting when E.Ps. Nos. 126 and 148 of 1946 were issued; alternatively that E.P. No. 77 of 1946 was an application in execution issued in the proper Court within three years of the final order in E.P. No. 173 of 1941 and its issue was a step-in-aid of execution and therefore E.Ps. Nos. 126 and 148 of 1946 are not barred by limitation.

The learned Master held that the order made in E.P. No. 173 of 1941 was a final order which disposed of that petition and, also, that E.P. No. 77 of 1946 issued in the Devakottah Subordinate Court, was not a valid application filed in a proper Court; consequently, the two execution petitions filed in this Court after the expiration of three years from the date of the final order in E.P. No. 173 of 1941 were barred by Article 182 (5) of the Limitation Act.

On appeal, Kunhi Raman, J., held that the order made in E.P. No. 173 of 1941 was not a final order and the petition was not disposed of so that the present execution petitions are not barred and the earlier petition can be revived or continued. On that finding the learned Judge did not consider it necessary to express a decision regarding the correctness or otherwise of the order in the Devakottah Court on E.P. No. 77 of 1946. Accordingly he allowed the appeal and set aside the learned Master's order of dismissal and granted to the respondent the relief sought in the two execution petitions. This appeal is against the learned Judge's order.

Whilst it is not conclusive as to the effect of the order made in E.P. No. 173 of 1941, it is manifest that, until the issue of E.P. No. 148 of 1946, the respondent-decree-holder himself considered that that was a final order and that it terminated that execution petition. In the tabular statement in E.P. No. 126 of 1946, reliance is placed solely upon the issue of E.P. No. 77 of 1946, in the Devakottah Court as saving limitation. Further, in his affidavit supporting E.P. No. 126 of 1946, the respondent states, in paragraph 4, that a consent order was passed on the 3rd February, 1943, in E.P. No. 173 of 1941, and, in paragraph 13, that he had filed E.P. No. 77 of 1946, in order to save limitation.

Firstly as to the finality or otherwise of the order made on the 3rd February, 1943, in E.P. No. 173 of 1941. In *Chidambaram* v. *Murugesan*[1], it was held that " final order " in Article 182 (5) means an order putting an end to the application in respect of which it is made. In *Rama Reddi* v. *Motilal Daga*[2], it is observed at page 334 of the report that

> " the words ' final order ' imply that the proceeding has terminated so far as the Court passing it is concerned."

An application to revive or continue an execution petition will lie only when the former petition has not been disposed of finally ; vide *Sundaramma* v. *Abdul Khadar*[3].

It is contended by Mr. Viswanatha Sastri, for the respondent, that since his client sought to obtain Rs. 12, 753-3-3 by means of E.P. No. 173 of 1941, and had recovered only Rs. 2,450, the order made by consent in that petition was not a final disposal of it but that it still remained alive whilst any relief sought by it had not been obtained and, also, that the order does not include a direction that the petition be dismissed.

The order was made upon the memorandum of consent which was signed by the parties and their advocates. The formal order of the Court recites that the execution petition came before the Court to be mentioned as " settled." When any proceeding is " settled " by the parties, whether it be a suit or any other proceeding, the subject-matter of it is terminated by the agreement of settlement which they make, unless there is anything from which it is manifest that final settlement was not agreed but that something remained for future agreement, disposal or decision in that proceedings. Whilst the respondent sought to obtain Rs. 12,753 by means of the execution petition, nevertheless, under the terms of the agreement to which he was a party and upon which the order was made, it is provided, out of the sum of Rs. 4,146-8-11 due to the appellant that the respondent should take only Rs. 2,450, the appellant was to have Rs. 1,396-8-11 and three lots of advocates' fees, each of Rs. 100 should also be paid. Those terms indicate a final settlement about the distribution of the available money in Court in respect of which the respondent was entitled to recover the whole. The last term, that the rights of the parties in the sum of Rs. 65,000 remaining in the Court should be worked out in appropriate proceedings separately, make it clear, to my mind, that any further division or allocation of the money in Court was to be the subject of other proceedings and not to be dealt with in the execution petition. If it had been the intention of the parties that the execution petition should remain alive for further disposal and to deal with the other moneys remaining in Court or any other matter of execution, the agreement between the parties and the order by consent made pursuant to that agreement would have contained a term to that effect and there would have been no provision by which the rights of the parties to the money remaining in Court were to be worked out in appropriate proceedings. In my view, there is no doubt that the parties intended to terminate all matters of the execution petition by the agreement which they made and which agreement was intended to effect a final disposal of the execution petition. The order made upon the agreement with the consent of the parties was intended to be, and was, a final order which put an end to the petition. The inclusion in the order of such words as

1. (1939) 2 M.L.J. 774 : I.L.R. (1940) Mad. 60.
2. I.L.R. (1938) Mad. 326.
3. (1932) 64 M.L.J. 664 : I.L.R. 56 Mad. 490.

"dismissal" or "final disposal" were quite unnecessary; the language of the order itself reflects only that it was a final order terminating all matters in the execution petition. After the order was made there was nothing left for disposal which could be the subject of a subsequent application to revive or continue the execution petition. The order made on the 3rd February, 1943, was final and completely disposed of that petition. It follows that E.P. No. 173 of 1941 does not save limitation running against the respondent's petitions E.P. Nos. 126 and 148 of 1946, and it cannot be revived or continued.

Now regarding E.P. No. 77 of 1946 issued in the Devokottah Court on 8th January, 1946. Whilst the decree was passed by that Court, it had been transferred to the High Court in 1941. No application for its re-transfer was made, and the decree remained in the High Court where it still was when E.P. No. 77 of 1946 was issued. Section 42 of the Code of Civil Procedure enacts that the Court executing a decree sent to it shall have the same powers in executing the decree as if it had been passed by itself. In *Pierce Leslie* v. *Perumal*[1], Sir John Wallis, C.J., observed at page 1077 that section 42 and the following sections,

> "have the effect of depriving the Court, sending the decree, of authority to execute it itself and of making the Court to which the decree is sent the executing Court to all intents and purposes".

In *Maharaja of Bobbili* v. *Sree Raja Narasaraju Pedda Baliar Simhulu Bahadur*[2], it was held that the Court to which a decree is sent for execution, is the only Court which has seisin of the execution proceeding. The powers and jurisdiction of a Court from which its decree has been transferred to another Court were considered at some length and the decisions upon the subject were reviewed in *Nagi Reddi* v. *Kotamma*[3]. There, it was held that, whilst an application may always be made to the Court which passed the decree for an order for re-transferring it and such an application is a step-in-aid of execution and prevents limitation running against the decree-holder, nevertheless a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings; and in such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or unless the proceedings in the Court to which the decree was sent has been stayed for the purpose of executing the decree in the first Court. In the present instance neither of the two above-mentioned exceptions exists.

Mr. Viswanatha Sastri relied upon the decision in *Subba Rao* v. *Ankamma*[4]. There, an assignee decree-holder applied to the Court which passed the decree to be recognised as such and for concurrent execution. The finding was that such an application was sustainable and that that Court, after entertaining it, need not stay its hand until a certificate under section 41 of the Code had been received or the records returned. In that case the contention against the application made was that that Court should wait for the above certificate. In my view there is nothing in the last mentioned decision which runs counter to the other authorities which have been cited.

E.P. No. 77 of 1946 was issued in the Devakottah Court. That Court had not the decree before it, which is the rescript for its execution, but it was in the custody of the High Court. In the absence of the decree, and since concurrent execution had not been directed and execution of the decree in the High Court had not been stayed, the Devakottah Court had no power or jurisdiction to execute the decree. The only Court at the time when the execution petition was issued in Devakottah, which could execute the decree, was the High Court to which alone an effective application in that behalf could have been made. The Devakottah Court was not, but the High Court was, the proper Court within the contemplation of Article 182 (5) by which a final order could have been passed on an application made in accordance with law for execution or to take some step-in-aid of execution. It follows that E.P. No. 77 of 1946 issued in the Devakottah Court

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1. (1917) 33 M.L.J. 130 : I.L.R. 40 Mad. 1069 (F.B.).
2. (1912) 23 M.L.J. 236 : I.L.R. 37 Mad. 231.
3. (1947) 1 M.L.J. 156.
4. (1932) 63 M.L.J. 788.

was not such an application and its issue by the respondent, although within three years of the final order passed in E.P. No. 173 of 1941 does not save limitation from barring E.P. Nos. 126 and 148 of 1946.

In my opinion for the reasons given this appeal should be allowed, the reversal of the learned Master's order should be set aside and that order should be restored. The appellant is entitled to his costs of this appeal and of the hearing before Kunhi Raman, J.

The cheque for Rs. 13,203-5-0 drawn in favour of the appellant by the Registrar, now in Court awaiting orders, will remain in Court for fourteen days more. If during that period the respondent presents an application for leave to appeal to His Majesty in Council, the cheque will continue so to remain and its disposal will be dealt with upon the hearing of that application. But if such an application is not made in fourteen days, that cheque, or a fresh cheque, will be handed over to the learned advocate for the appellant.

Bell, J. :—I agree.

B.V.V. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kuppammal and others .. *Appellants**

v.

Seetharama Aiyar .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 39 *and section* 151—*Temporary injunction—Power of Subordinate Courts to grant* ex debito justitiae.

The Subordinate Courts have no inherent jurisdiction to grant a temporary injunction *ex debito justitiae.* When a case cannot be brought within the four corners of Order 39, Civil Procedure Code, which expressly deals with injunctions, the inherent jurisdiction of the Court cannot be invoked to add to the powers thus conferred.

Murugesa Mudaliar v. *Angamuthu Mudaliar,* (1937) 2 M.L.J. 888, followed.

Appeals against orders of the District Court, Madura, dated 10th December, 1947, in I.A. No. 532 in A.S. No. 134 of 1947 and in I.A. No. 533 of 1947 in A.S. No. 136 of 1947 respectively (O.S. No. 15 of 1944, Subordinate Judge's Court, Madura).

B. Srinivasa Murthi for Appellants in Second Appeal No. 602 and *M. Appa Rao* for Appellants in Second Appeal No. 603.

V. Ramaswamy Iyer for Respondent in both.

The Court delivered the following

JUDGMENT.—One of the properties concerned in the suit by the appellant was a house in which he had been residing. Under a compromise decree, this house was awarded to the respondent. It was argued that this compromise was not binding on the appellant. That contention was upheld ; but the trial Court came to the conclusion that the family agreement, upon which the compromise decree was based, was binding on the minor appellant. Even if the correctness of the decision of the lower Court with regard to the binding nature of this agreement is open to question, the plaintiffs failed to prove to the satisfaction of the trial Court that the house in question was joint family property. The suit was dismissed. During the pendency of an appeal to the District Court of Madura, the appellant prayed for an interim injunction, restraining the respondent from executing his decree by dispossessing him of the house. That prayer was refused ; and against that order this appeal has been filed.

It is clear from a mere perusal of Order 39, rule 1, that this case would not come within that rule ; but it is argued that the lower appellate Court had inherent jurisdiction to grant a temporary injunction *ex debito justitiae.* The learned advocate

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* A. A. O. Nos. 602 and 603 of 1947. 9th February, 1948.

for the appellant relies in that connection on *Kanshiram* v. *Sharaf Din*[1], where it is said, following another decision of the same High Court (the Punjab Chief Court), that the Civil Procedure Code is not exhaustive and that the Court has inherent jurisdiction to act *ex debito justitiae* in order to do that real and substantial justice, for the administration of which alone it exists. I however find myself in complete accord with Varadachariar, J., who had to consider the same question in *Murugesa Mudaliar* v. *Angamuthu Mudaliar*[2]. The learned Judge there remarked,

> " I am aware it has been some times held that Order 39, rules 1 and 2 are not exhaustive of the Court's power to grant a temporary injunction. . . . . . . .Whatever may be said as to the power of the High Court to issue injunction for other purposes and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of Subordinate Courts must be found within the four corners of the Code and it seems to me too much to suggest that, when the Code has expressly dealt with injunctions in Order 39, section 151 can be invoked to add to the powers thus conferred."

The above is the view that has been generally held in this High Court, *e.g.*, *Varadacharyulu* v. *Narasimhacharyulu*[3].

The appeal fails and is dismissed with costs.

C.M.A. No. 603 of 1947 raises the same point as has been discussed in C.M.A. No. 602 of 1947 ; it also fails and is dismissed with costs.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Maharajah Sri Sri Rajah Saheb Meharban Dhosthan Raja Sri Rao Swetachalapathi Ramakrishna Ranga Rao Bahadur Varu, Rajah of Bobbili .. *Petitioner**

v.

Maradana Venku Naidu .. *Respondent.*

Civil Procedure Code (V of 1908), Order 47, rules 4 (2) proviso (b) and 7—Strict proof—Proof of ignorance after exercise of due diligence necessary before review can be ordered.

In execution of a decree, the decree-holder brought a certain property to sale in E.P. No. 9 of 1939. The sale was confirmed in E.A. No. 656 of 1941 and the decree-holder applied for delivery of the property to him and delivery was ordered. Thereafter the decree-holder filed another application E.A. No. 690 of 1944 praying again for delivery. This petition was dismissed on the ground that it was barred by limitation. The decree-holder then filed E.A. No. 1438 of 1944 for review of the order on E.A. No. 690 of 1944 on the ground that that application was unnecessary because delivery was actually effected in E.A. No. 656 of 1941, and prayed that the application should not be dismissed on the ground of limitation, but on the ground that it was unnecessary. The District Munsiff reviewed his previous order, but on appeal, the Subordinate Judge restored the order passed in E.A. No. 690 of 1944 dismissing that application on the ground of limitation. In revision,

Held, that though the proviso (*b*) to sub-rule (2) of rule 4 of Order 47, Civil Procedure Code makes no mention of the exercise of due diligence, the words " was not within his knowledge or could not be adduced by him when the decree or order was passed or made," must be taken to be qualified by the words " after the exercise of due diligence" and assuming that "strict proof" means not sufficiency of proof, but the formalities of proof in accordance with law, it is impossible to say that these formalities have been complied with by an affidavit which does no more than baldly state that something was not known to the petitioner at the date when the order was made, in respect of which the review petition had been filed, without offering any adequate explanation of his ignorance of what, on the face of it, should have been perfectly well known to him and the lower appellate Court was quite justified in setting aside the order allowing the review.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Chicacole, dated 11th January, 1947, in A. A. O. No. 19 of 1945 (E. A. No. 1438 of 1944 in O.S. No. 574 of 1918, District Munsiff's Court, Parvatipuram).

Alladi Kuppuswamy for Petitioner.

S. Ramamurthy for Respondent.

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1. A.I.R. 1923 Lah. 144 (2).
2. (1937) 2 M.L.J. 888.
3. (1925) 23 L.W. 85.

* Civil Revision Petition No. 706 of 1946. 15th October, 1947.

The Court delivered the following

JUDGMENT.—This is a petition for the revision of a judgment of the Subordinate Judge of Chicacole by which he set aside an order made by the District Munsiff of Parvatipur reviewing a previous order of his made in E.A. No. 690 of 1944, in O.S. No. 574 of 1918 by which he dismissed that application on the ground that it was barred by limitation. The petitioner filed a decree in this suit (O.S. No. 574 of 1918), and in execution of it brought the property to sale in E.P. No. 9 of 1939. The sale was confirmed on the 18th of April, 1940, and in E.A. No. 656 of 1941 the petitioner applied for delivery of the property. An order for delivery was made, and according to the record, delivery was actually effected on the 25th of July, 1941. Thereafter the petitioner filed another application, E.A. No. 690 of 1944, praying again for the delivery of the property. This petition was dismissed on the ground that it was barred by limitation by reason of the fact that it was filed more than three years after the confirmation of the sale, and it is not denied that the application fell to be dismissed for this reason. The application out of which this civil revision petition arises, E. A. No. 1438 of 1944, was then made for a review of the order in E. A. No. 690 of 1944 on the ground that the application on which that order had been passed was unnecessary because delivery had actually been effected in E. A. No. 656 of 1941 on the 25th of July, 1941, and it was prayed that the application should be dismissed not on the ground that it was barred by limitation but on the ground that it was unnecessary in view of the fact that delivery had already been effected. The District Munsiff, as already stated, reviewed his previous order, but the learned Subordinate Judge allowed the appeal to him, and restored the order passed in E. A. No. 690 of 1944 dismissing that application on the ground that it was barred by limitation.

On merits there can be no question that the learned Subordinate Judge was right and that the application for review should never have been allowed. If the property was actually delivered to the petitioner on the 25th of July, 1941, and he remained in possession of it, no object could be served by having the order, dismissing E. A. No. 690 of 1944 on the ground that it was barred by limitation, set aside. If the petitioner had taken delivery and was in possession, his application, E. A. No. 690 of 1944, was no doubt otiose even if in time; but the order dismissing it could not affect him adversely. Moreover, it was a correct order in the circumstances, and there was accordingly no ground for reviewing it. It is argued, however, by learned counsel for the petitioner that it was not open to the learned Subordinate Judge to reverse the decision of the District Munsiff on merits and that, in fact, no appeal from the decision of the District Munsiff lay. Order 47, rule 7 of the Civil Procedure Code provides that :

> "An order of the Court rejecting the application (*i.e.*, for review) shall not be appealable ; but an order granting an application may be objected to on the ground that the order was
>
> (*a*) in contravention of the provisions of rule 2,
>
> (*b*) in contravention of the provisions of rule 4, or
>
> (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause."

There is no question in the present case of the order made by the District Munsiff contravening the provisions of rule 2 or that the application was made after the expiration of the period of limitation prescribed. The question is whether the order was in contravention of the provisions of rule 4. Order 47, rule 4, sub-rule (2) provides that :

> "Where the Court is of opinion that the application for review should be granted, it shall grant the same ; provided that—
>
> (*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

In the present case review was prayed for on the ground that when the application for delivery (E. A. No. 690 of 1944) was made it was not within the knowledge of

the petitioner that delivery had already been effected on the 25th of July, 1941. The application was supported by an affidavit and the respondent by a counter-affidavit denied the truth of the petitioner's affidavit. The learned Subordinate Judge after considering the facts and the circumstances of the case did not believe that the application for review was made in good faith or that the petitioner when he filed E. A. No. 690 of 1944 was unaware of the fact that delivery had already been ordered and recorded in E. A. No. 656 of 1941.

Learned counsel for the petitioner contends that the lower appellate Court was not competent to consider the sufficiency of the proof that when E. A. No. 690 of 1944 was filed the order passed on E. A. No. 656 of 1941 was not within the knowledge of the petitioner. The words "strict proof" in Order 47, rule 4, proviso (*b*) to sub-rule (2), it is argued, mean only formal proof, the sufficiency of which is a question for the Court which hears the review petition, the appellate Court being concerned only with the question whether formal proof in accordance with law had been adduced. For the view propounded, learned counsel relies on the decision of the Calcutta High Court in *Ahid Khondkar* v. *Mahendra Lal De*[1], a dcision which, as he points out, has been followed by the Bombay High Court and by single Judges of this Court in *Seeramma* v. *Seshamma*[2] and *Muthuswami Naicker* v. *Chidambaram Chettiar*[3]. In *Ahid Khondkar* v. *Mahendra Lal De*[1], Jenkins, C.J., said :

> "The word 'proof' ordinarily has one of two meanings ; either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of word 'strict' seems to me to point to the second of these two meanings, and the strict proof, in my opinion, means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is the formality which is prescribed and not the result that is described."

Woodroffe, J., said :

> "This rule [clause (*b*) of sub-section 1, rule 7 of Order 47] does not, I think, refer to the weight or sufficiency of the evidence. If the legal formalities are observed, it is no objection that the probative force of evidence legally taken appears to be different to the appellate Court from what it appeared to the Court granting review. . . . . . 'Strict proof,' in my opinion, means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction."

According to this decision, therefore, the duty of the appellate Court is to ascertain whether there has been proof according to the formalities of law and not whether the proof convinces it that the new matter or evidence was not within the knowledge of the applicant and could not be adduced by him when the decree or order was passed or made. The question of the sufficiency of the proof is a question solely for the Court of first instance. My attention has been drawn to a decision of Burn, J., reported in *Ahmed Khan* v. *Venkatachalamayya*[4] in which he dissented from the decision of the Calcutta High Court cited above and the decisions of the two single Judges of this Court which followed that decision. Burn, J., was of the opinion that strict proof means proof which is sufficient to convince the Court of the truth of the allegation made and that it is open to an appellate Court to go into the question of the sufficiency of the proof accepted by the lower Court. In view of the preponderance of authority on the other side I do not think it is open to me to follow this decision of Burn, J. In the present case, however, even if the meaning attached to "strict proof" in *Ahid Khondkar* v. *Mahendra Lal De*[1] is accepted, it seems to me that the order of the District Munsiff was in contravention of the provisions of rule 4 and that for that reason the lower appellate Court was right in setting the order aside even if it was not right in the view that it was open to it to go into the merits of the case and decide the appeal on the ground that on merits the application should have been dismissed.

Rule 1 of Order 47 gives as a ground for an application for review of judgment by an aggrieved person the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

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1. (1915) I.L.R. 42 Cal. 830.
2. A.I.R. 1933 Mad. 217.
3. A.I.R. 1939 Mad. 289 : 49 L.W. 430.
4. (1942) 1 M.L.J. 278.

The proviso to sub-rule 2 of rule 4 of Order 47 makes no mention of the exercise of due diligence, but it is clear that the words " was not within his knowledge or could not be adduced by him when the decree or order was passed or made " are implicitly qualified by the words " after the exercise of due diligence ". In the affidavit filed by the petitioner there is no attempt at all to show that at the time when he filed E.A. No. 690 of 1944, he was unaware of the fact that the property had already been delivered to him in spite of the exercise of due diligence on his part. On the contrary, the reason given for the surprising ignorance of the previous delivery of the property is that after the delivery there had been some changes in the office staff. Moreover, not only is no adequate reason for the want of knowledge of the previous delivery given in the affidavit, but the question of the exercise of due diligence or want of knowledge by the petitioner was not considered at all by the District Munsiff. Accepting the view that strict proof means not sufficiency of proof but the formalities of proof in accordance with law it seems to me impossible to say that those formalities have beem complied with by an affidavit which does no more than baldly state that something was not known to the petitioner at the date when the order was made in respect of which the review petition had been filed without offering any adequate explanation of his ignorance of what, on the face of it, should have been perfectly well known to him. In my opinion, in the present case the affidavit which was the only evidence adduced by the petitioner does not amount to strict proof of the allegation that the fact of previous delivery was not within his knowledge at the time when the order in E.A. No. 690 of 1944 was passed. It is plain that with the exercise of reasonable diligence the evidence with regard to the fact that delivery had already been effected could have been adduced by him in the course of the hearing of E.A. No. 690 of 1944. In that view, the order made by the District Munsiff of Parvatipur reviewing his previous order was in contravention of the provisions of rule 4 so that the judgment of the Subordinate Judge setting aside that order was correct, although not altogether for the reasons given by him.

This petition is dismissed with costs.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Nagupudi Krishnamma Naidu and others .. *Appellants.* *

v.

Polidili Chinna Venkapathi Naidu .. *Respondent.*

Madras Estates Land Act (I of 1908), *section* 42 (1), (2) *and* (3)—*Excess areas in the holding of tenants—Claim of rent—In the absence of express agreement whether claim could be sustained under clause* (3) *to section* 42.

A mere statement of the area as well as the rent in a patta does not discharge the burden on the landlord ; he must go further and show that the area was the basis for the fixation of the rent specified. If the rent mentioned was a consolidated rent for the field in question, assumed to be roughly of a particular area, then the remedy of the landlord, if the area found in the tenant's possession is in excess of what is stated in the patta, is to apply under section 42 of the Madras Estates Land Act to the Collector. *Nanda Kishore* v. *Khetabuddin Ahmad*, A.I.R. 1937 Cal. 632, followed.

Where a landlord brought suits against his tenants under section 77 of the Madras Estates Land Act claiming rent also for excess areas said to be in the holding of the tenants,

Held, that under clause (3) of section 42 of the Act the agreement should be an express one, and in the absence of such an agreement in the present case the suits filed by the landlord had to dismissed. This however should not be taken to mean that the landlord would be precluded from taking appropriate steps under clauses (1) and (2) of the same section.

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*S. A. Nos. 1614, 1874 to 1877 and 2114 of 1945. 16th January, 1948.

Appeals against the decrees of the District Court, Chittoor, in A.S. No. 287, etc., of 1944, respectively, preferred against the decrees of the Court of the Deputy Collector, Chittoor division, in R.S. No. 34, etc., of 1942, respectively.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Appellants.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

The Court delivered the following

JUDGMENT.—In the suits for rent brought under section 77 of the Madras Estates Land Act, the landlord claimed rent also for excess areas said to be in the holdings of the tenants. The excess area was ascertained, it is said, at a survey under the Surveys and Boundaries Act, to which the tenants were not parties. Both the lower Courts have decreed the suits even as regards rent for the excess areas, holding that the cases fell under clause (3) of section 42 of the Madras Estates Land Act. The learned District Judge has proceeded upon the footing that the rent was fixed with reference to the area in the old pattas and that a glance at them would show that the rent varied in exact proportion to the extent. Exs. D-4, D-4 (*e*), D-4 (*b*) and D-5 are the old pattas. They do not bear out this statement of the learned District Judge ; there is nothing in them to show that the rents were fixed with reference to the area, or that the rents were varied in exact proportion to the extent. No data are available from which we could say that the rate of rent was such and such per cawnie of wet or dry land and that the rent given in the pattas for the area specified against the field number was arrived at on this basis. Moreover, for lands of the same description as regards crop and *taram*, the rents given vary, irrespective of the extent and are not proportionate.

I respectfully agree with the view taken by Biswas, J., in *Nanda Kishore* v. *Khetabuddin Ahmad*[1]. A mere statement of the area as well as the rent in the patta does not discharge the burden on the landlord ; he must go further and show that the area was the basis for the fixation of the rent specified. If the rent mentioned was a consolidated rent for the field in question, assumed to be roughly of a particular area, then the remedy of the landlord, if the area found in the tenant's possession is in excess of what is stated in the patta, is to apply under section 42 to the Collector.

Whether any implied agreement to be spelt out of the entries found in the old pattas can be relied on by the landlord to take the case out of the ambit of section 42, is itself open to doubt. Clause (3) refers to an agreement in writing, under which the rent is fixed in proportion to the area, or where the rent is fixed on the basis of an assumed area and the agreement provides for the alteration of the rent when the actual area is found to vary from the assumed area. This indicates, to my mind, that the agreement must be an express one. There is no such agreement in the present case.

The suits filed by the landlord for the excess rent in each case must therefore stand dismissed with proportionate costs in the trial Court. This, however, does not mean that the landlord is not entitled to take appropriate steps under section 42, clauses (1) and (2) for obtaining relief at the hands of the Collector.

The landlord will pay the costs of the tenants in the District Court and here.

Half the Advocate's fee will be allowed in each second appeal. Leave refused.

K.C. *Appeals allowed.*

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1. A.I.R. 1937 Cal. 632.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

In the matter of amending the name of an Advocate of this Court.

M. P. Gopal Menon (Advocate) .. *Petitioner.**

Legal Practitioner—Change of name—High Court can order amendment only in certificate and roll of advocates but not in Bar Council papers—Different caste suggested by new name—Amendment does not decide right to assume different caste.

It is open to any person to change his name and, after giving due notice of it in the Official Gazette, assume a new name. In accordance with such a change, there can be no objection, in the case of an advocate, to a corresponding change in the name appearing in the certificate and in the roll of advocates. But the High Court cannot grant his prayer in so far as it relates to the enrolment papers filed with the Bar Council.

Where the new name suggests that he belongs to a caste other than that which is indicated by his original name in the roll and certificate, the granting of the amendment should not be understood as deciding that he is entitled to describe himself as belonging to any particular caste.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to direct the amendment of the petitioner's name to read as " Nadumbilli Tharanallur Raman Nambudiripad, son of Nadumbilli Tharanallur Parameswaran Nambudiripad of Nadumbilli Tharanallur Illom in Kizhuthany Desom, Mukundapuram taluk in Cochin State," in the enrolment papers filed with the Bar Council in 1934, in the certificate issued to him bearing No. 857, dated 14th December, 1934, and also in the roll of advocates maintained by this Court, in the place of " M.P. Gopal Menon."

The petitioner in person.

The Order of the Court was made by

The Officiating Chief Justice.—This is an application by an advocate of this Court to direct an amendment of his name in the enrolment papers filed with the Bar Council, in the certificate issued to him, bearing No. 857, dated the 14th December, 1934, and also in the roll of advocates maintained by this Court. On the 13th December, 1934, the petitioner was admitted as an advocate of this Court and signed the roll as M.P. Gopal Menon. The certificate issued to him gave his full name as Machat Puthur Gopal Menon. The petitioner now wants his name to read as "Nadumbilli Tharanallur Raman Nambudiripad son of Nadumbilli Tharanallur Parameswaran Nambudiripad of Nadumbilli Tharanallur Illom in Kizhuthany Desom, Mukundapuram taluk in Cochin State." He has published an advertisement in the *Fort St. George Gazette*, dated the 25th November, 1947, of his intention to be known hereafter as above.

Obviously this Court cannot grant his prayer in so far as it relates to the enrolment papers filed with the Bar Council. The amendment, if he is entitled to it, can only be made in the certificate issued and in the roll of advocates maintained by this Court.

The amendment sought by the petitioner is not merely confined to a change of name but relates to a description of his father, of the Illom to which he belongs and his native place. Neither the certificate issued by this Court nor the roll of advocates maintained by it contains any provision for the mention of anything other than the name of the advocate. The petitioner, therefore, has restricted his application to an amendment of his name only.

No doubt it is open to any person to change his name and, after giving due notice of it in the official Gazette, assume a new name. In accordance with such a change, there can be no objection to a corresponding change in the name appearing in the certificate and in the roll of advocates. We therefore direct that the certificate No. 857 of 1934, issued to the petitioner will be amended by substituting for the name Machat Puthur Gopal Menon, the name Nadumbilli Tharanallur Raman

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*C.M.P. No. 6079 of 1947. 26th January, 1948.

Nambudiripad. The roll of advocates will be amended by substituting in the the place of M.P. Gopal Menon, the name of N. T. Raman Nambudiripad.

The name now adopted by the petitioner *prima facie* also suggests that he belongs to a caste other than that which is indicated in his name in the original roll and certificate. Therein he had described himself as a Menon ; in the name as now changed, he describes himself as a Nambudiripad. By granting the amendment as we have done, we should not be understood to have decided that the petitioner is entitled to describe himself as belonging to any particular caste. The order which we have now passed is a formal order consequent on the change of name notified in the official Gazette.

V.P.S. *Petition ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, AND MR. JUSTICE BELL.

Ramakrishna Ayyar Dharmam at Madura Town by its hereditary trustee, Ramakrishna Ayyar and another .. *Appellants.**

v.

Umar Salai Muhammad Sait .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order XLI, rule* 10—*Appeal* in forma pauperis—*Order to give security*—*Circumstances under which order can be made.*

Whilst it is necessary that special circumstances should exist before an order for security should be directed in an appeal *in forma pauperis*, where the appellant is doing no more than seeking to assert a right which he has failed to assert in the trial Court, and, in addition, which his immediate predecessor-in-title failed himself to establish in a Court of law, and the suit itself is for setting aside considerable number of alienations, the first of which was 36 years old and the alienees or purchasers have given full consideration, the circumstances fall under the category of special grounds for a Court ordering security.

Seshayyangar v. *Jainulavdin*, (1880) I.L.R. 3 Mad. 66, followed.

Appeal under clause 15 of the Letters Patent against the order of Rajamannar, J., dated 26th August, 1947, in C.M.P. No. 2763 of 1947 in Appeal No. 673 of 1946, preferred to the High Court against the decree of the Court of the Subordinate Judge, Madura, dated the 14th August, 1946, in O.S. No. 111 of 1945.

T. S. Vydinatha Aiyar for Appellants.

R. Gopalaswami Aiyangar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal pursuant to the provisions of clause 15 of the Letters Patent of this Court against an order of Rajamannar, J., made on the 26th August, 1947, directing the appellant before the learned Judge to furnish security for the respondents' costs, pursuant to the provisions of rule 10 of Order XLI of the Code of Civil Procedure. The appellant challenges the correctness of that order.

The appellant instituted a suit *in forma pauperis* in the Court of the Subordinate Judge of Madura. The suit was dismissed. He has now preferred an appeal also *in forma pauperis* against the learned Judge's dismissal. It is in respect of that appeal that the order, now appealed against, was made.

The claim by the appellant is to a considerable amount of property, the claim being based upon what is alleged to be a deed of trust dated 21st August, 1907, by which, according to the appellant, he has now become the sole hereditary trustee of the property, which property is dedicated to several charities. The learned Subordinate Judge in a very careful and exhaustive judgment found that

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* L.P.A. No. 49 of 1947. 26th November, 1947.

the trust deed was no more than a sham and a colourable transaction. He pointed out that in the deed there is no total divestiture of the property by the settlor, also that no accounts had been maintained in respect of the estate income and expenditure, no communication had been made to any public institution with regard to the endowment of some charities, and that the deed provides a surplus income which is disproportionately large when compared with the amounts provided for charities, and which proportion was to be appropriated by the managing trustee, for the time being. The suit in which that decision was given was instituted in the year 1945. In his lifetime, the appellant's father made an identical claim on his own behalf in the year 1932. That suit ended similarly, as did the suit with which the present appeal is concerned.

There is no doubt that, so far as this High Court is concerned, the provisions of Order 41, rule 10, have application to appeals *in forma pauperis*. It was so found in *Seshayyangar* v. *Jainulavadin*[1] where it was observed that since leave to appeal *in forma pauperis* is given only when there is a *prima facie* reason for believing there are substantial grounds of appeal, very special grounds should be shown before a Court should be called upon to order security and to apply the provisions of rule 10 of Order 41. That decision was given by this Court some 67 years ago, and in a considerable number of decisions, mostly by Benches of two Judges, the correctness of it has not been questioned, and it has been followed.

Rajamannar, J., in ordering the appellant to furnish security in respect of the respondents' costs to the extent of Rs. 3,000 gives as his reason those which have been found and which are required in one or other of the decisions of this Court, and particularly he pointed out that the respondents in this appeal never hoped to recover the costs from the appellant, the application for security was made promptly, the amount involved is large, and, on the merits, there is the factor of a previous unsuccessful attempt to enforce the same rights, which the appellant is seeking to enforce, by his father during his lifetime.

It is not irrelevant to point out that by the suit the appellant is seeking to set aside a considerable number of alienations of property in respect of which the alienees or the purchasers who are defendants in the suit gave full consideration. The longest time since the first of those alienations took place is some 36 years, as it was effected in the year 1911.

The appellant's suit was not the first time that the claim which he made had been put forward and which failed in this Court at considerable expense to the defendants in that suit, and they or their successors are the defendants in the present suit. Whilst it is necessary that special circumstances should exist before an order for security should be directed in an appeal *in forma pauperis* in my view, when the appellant is doing no more than seeking to assert a right which he has failed to assert in the trial Court and, in addition, which his immediate predecessor-in-title failed himself to establish in a Court of law, that is a circumstance which falls within the contemplation of the decision in *Seshayyangar* v. *Jainulavadin*[1] given some 67 years ago.

For the reasons given, in my view, this appeal should be dismissed with costs. Learned counsel for the appellant has, with some force, asked us to extend the time by one month from to-day during which security directed by Rajamannar, J., should be furnished. In light of his forceful application, it should be granted since there is a prospect that security will be found.

Bell, J.—I agree.

V.P.S. *Appeal dismissed.*

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1. (1881) I.L.R. 3 Mad. 66.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

P. Thirumal Nadar .. *Appellant**

v.

Pichai Ammal and another .. *Respondents.*

Benami—Husband and wife—Property purchased in name of wife—Object being to place property beyond reach of husband—Rule of benami if applicable.

The fact that the consideration for a purchase has been found by the husband is not conclusive against the wife in whose name the property had been purchased. It is only when the purchase is unexplained by other proved or admitted facts that the conclusion should follow that the transaction is benami for the husband. Where the evidence showed that the mortgage and the subsequent sale were taken in the name of the wife with the object that the property should belong to her and that it should not be within the reach of her husband as it was feared that he might dissipate it,

Held, that the transaction entered into in the name of the wife was not benami for her husband.

Lakshmiah Chetti v. *Kothandarama Pillai*, (1925) 49 M.L.J. 109 : L.R. 52 I.A. 286 : I.L.R. 48 Mad. 605 (P.C.), considered.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Aiyar, J., in C. C. A. No. 69 of 1945 (O. S. No. 173 of 1943, City Civil Court, Madras).

K. Krishnaswami Aiyangar and *N. Suryanarayana* for Appellant.

S. Panchapagesa Sastri and *T. V. Balasubramania Aiyar* for Respondents.

The Court delivered the following

JUDGMENTS : *Rajamannar, J.*—This is an appeal under clause 15 of the Letters Patent against the judgment of Chandrasekhara Aiyar, J., dismissing an appeal from the Additional Judge of the City Civil Court at Madras. The suit was instituted by the first respondent herein for partition of the properties in suit consisting of two items of immoveable property and for delivery to her of one share thereof, the other share to be delivered to the second defendant. The plaintiff and the second defendant are the daughters of the first defendant by his first wife, one Marimuthu Ammal, who died on the 19th February, 1943. The suit was brought on the basis that the two items of immoveable property belonged absolutely to Marimuthu Ammal, and on her death, devolved in equal shares on her two daughters, the plaintiff and the second defendant. The first defendant, the father, contested the suit and claimed that Marimuthu Ammal, his deceased wife, had no title to either of the properties.

The case for the plaintiff was that in regard to the first item of property, the first defendant conveyed it absolutely to her mother by a deed of settlement dated 22nd September, 1923. The case of the first defendant was that the settlement deed was executed nominally and was not intended to be operative. The second item of property was purchased on the 4th January, 1924, for a consideration of Rs. 800 and the sale deed was taken in favour of the plaintiff's mother, Marimuthu Ammal. The sum of Rs. 800 was made up of Rs. 260 paid in cash at the time of the registration of the sale deed and the balance was the amount due to Marimuthu as the mortgagee under the deed of mortgage dated 14th September, 1923 (Ex. D-17) which had been executed in her favour by the vendor to secure a sum of Rs. 500. The case of the first defendant in regard to this item was that the consideration was provided by him and it was not intended that the wife, Marimuthu, should have any title to the property. The learned Additional Judge of the City Civil Court, after a consideration of both oral and documentary evidence, held that Marimuthu, the mother of the plaintiff and the second defendant, was absolutely entitled to both the properties. He held that the settlement deed in respect of item 1 and the mortgage deed and the sale deed in respect of item 2

* L.P.A. No. 2 of 1947. 4th December, 1947.

were not benami transactions but transactions intended to convey beneficial interest to Marimuthu. The learned Judge came to this conclusion in view of the evidence adduced in the case that the first defendant was at the time of the transactions keeping a concubine and the transactions were brought about in favour of the wife at the suggestion of common friends, because it was apprehended that the first defendant might squander away the properties of the concubine. The evidence pointed to the conclusion that the settlement deed and the mortgage taken in the name of the first defendant's wife, both of which took place at a short interval, were intended to make a provision for Marimuthu, the first defendant's wife. The learned Judge of the City Civil Court, therefore, granted a decree in favour of the plaintiff for a half share in the two items of property. There was an appeal to this Court by the first defendant and the learned Judge, Chandrasekhara Aiyar, J., agreed with the trial Judge in the findings in respect of both items 1 and 2. He confirmed the decree of the lower Court and dismissed the appeal. The first defendant has filed an appeal against the decree and judgment of Chandrasekhara Aiyar, J., but has confined his claim to item 2 only. The Letters Patent Appeal is concerned only with the title to item 2.

Learned counsel for the appellant relied upon the concurrent findings of the learned trial Judge and the learned Judge of this Court that the consideration for the mortgage as well as the sale in respect of item 2 was found by the first defendant. He contended that as there was no presumption of advancement in this country when property was purchased by a husband with his own funds in the name of his wife, it followed that the first defendant was entitled to the property so purchased. He relied for his contention on three decisions of the Judicial Committee, *Lakshmiah Chetti* v. *Kothandarama Pillai*[1], *Guram Ditta* v. *Ram Ditta*[2] and *Shambhu Nath Shivpuri* v. *Prishka Nath*[3]. It is not necessary to make a detailed reference to the latter two cases which dealt with a deposit by a Hindu of money in a bank in the joint names of himself and his wife, and it is sufficient to refer to the case of *Lakshmiah Chetti* v. *Kothandarama Pillai*[1], which was a case where the husband purchased the property in the name of his wife with his own money. The law on the point was thus laid down at page 608 of the report by Sir John Edge :

> "There can be no doubt that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife."

It is clear from the rule thus enunciated that the fact that the consideration for a purchase has been found by the husband is not conclusive against the wife in whose name the property had been purchased. It is only when the purchase is "unexplained by other proved or admitted facts" that the conclusion should follow that the transaction is benami for the husband. In this case, the learned Judge who tried the case as well as the learned Judge of this Court who heard the appeal have found facts admitted and proved which gave an adequate explanation for the transaction in the name of the wife. Chandrasekhara Aiyar, J., agreeing with the Court below, held on a consideration of the surrounding circumstances and the probable causes likely to have operated on the minds of the parties to bring about the transaction, that the mortgage and the sale were taken in the name of the wife, with the object that the property should belong to her and that it should not be within the reach of the first defendant, as it was feared that he might dissipate it. I have no hesitation in agreeing with the learned Judge.

It was contended by learned counsel for the appellant that the plaintiff was not entitled to any relief in respect of item 2 because of the pleading in paragraph 4 of the plaint that item 2 was purchased by her mother with her own moneys. We are not impressed with this contention because this averment is followed by

1. (1925) 49 M.L.J. 139 : L.R. 52 I.A. 286 : I.L.R. 48 Mad. 605 (P.C.).
2. (1928) 55 M.L.J. 651 : L.R. 55 I.A. 235 : I.L.R. 55 Cal. 944 (P.C.).
3. (1944) 2 M.L.J. 348.

the assertion that the plaintiff's mother was in sole and absolute ownership and possession of the said properties. Further, the evidence on which the learned trial Judge came to the conclusion that the transaction was not benami was in great part evidence adduced on behalf of the first defendant himself. I do not think that the first defendant was prejudiced in any way in the conduct of his case because of the defect in the allegation in the plaint.

As I am in complete agreement with the conclusions of the learned trial Judge as well as the learned Judge of this Court on appeal, it is not necessary to deal at length with the evidence in the case. It suffices to mention that though Marimuthu Ammal lived for a period of nearly 20 years after the transactions in respect of items 1 and 2, there was no attempt on the part of the first defendant to obtain from her any acknowledgment of the title of the first defendant, if really the case of the first defendant was *bona fide*. On the other hand, nearly ten years after the date of the transactions, in a mortgage executed on the 12th April, 1933, Ex. D-7, to which the first defendant was also a party, he subscribes to a statement that his wife, Marimuthu, was absolutely entitled to both items 1 and 2. The evidence of the common friends who mediated between the husband and the wife also supports the conclusion arrived at by the trial Judge. D.W. 2, for instance, says that:

"there were always quarrels beween him (first defendant) and his wife and as we thought he would squander away his property, we brought about this settlement deed."

D.W. 3 said that:

"as he was keeping a concubine we made him settle the property on his wife."

There are no merits in this appeal which fails and is dismissed with the costs of the first respondent.

The Chief Justice.—I agree and have but a few words to add. It was common ground that the object of placing the properties in the name of the wife was to prevent its dissipation or the proceeds of sale from being dissipated upon the husband's concubine. It was urged on behalf of the appellant that, effecting the transaction nominally in the name of the wife, would safeguard the properties. Clearly, that would not be so, if the property remained that of the husband; he could do whatever he liked with it. It could only be, when the interest and title in the property passed to the wife, that it was safeguarded from dissipation either by the husband upon the concubine or by the concubine herself.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Kaliammal and others .. *Appellants**

v.

Sundarammal and others .. *Respondents.*

Hindu Law—Partition—Reunion—Presumption—Proof—Compromise by widow—Entire right of reversion given up—No corresponding benefit to estate—Binding nature of compromise.

After a partition the presumption would be against a reunion, which must be strictly proved Reunion can be proved by subsequent conduct of the parties, but to establish it, it is necessary to show not only that the parties already divided lived together, but that they did so with the intention of thereby altering their status and forming a joint estate with all its usual incidents.

Venkataramayya v. *Tatayya*, (1943) 2 M.L.J. 83, referred to.

A compromise entered into by a limited owner on behalf of the estate cannot be binding on the reversioners unless it is reasonable and prudent and for the interests of the estate. A compromise by which the entire right of the reversion was surrendered without any corresponding benefit to the estate, can in no sense be held to be reasonable or prudent.

Case-law reviewed.

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* Appeal No. 249 of 1945. 23rd February, 1948.

Appeal against the decree of the Court of the Subordinate Judge, Salem, in O. S. No. 33 of 1944.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Appellants.

The Advocate-General (*K. Rajah Aiyar*) and *S. Ramayya Nayak* for Respondents.

The Order of the Court was made by

The Officiating Chief Justice.—This appeal arises out of a suit filed by the first respondent in the Court of the Subordinate Judge of Salem to recover possession of the properties set out in Schedule A to the plaint as the sole surviving daughter and heir of her father, one Chinnaswami Kandar, after the death of her mother, Meenakshi Ammal. Originally, there were ten defendants of whom the first defendant was the main contesting defendant and defendants 2 to 10 claimed to be lessees under him. The first defendant died soon after the institution of the suit and defendants 11 to 15 were brought on record as his legal representatives. But the 11th defendant disclaimed all interest in the suit properties and therefore may be left out of consideration. The suit was decreed and hence the appeal by defendants 12 to 15 as the legal representatives of the first defendant.

One Kolanda Karuppa Kandar had two wives. By his first wife, he had two sons, Kumarasami and Swami ; and by his second wife two sons, Periasami and Chinnasami. Chinnasami was married to Meenakshi, the mother of the plaintiff, and he had by her two daughters, the plaintiff and another who died in or about 1930, leaving a son. Periasami married two wives and by his first wife had a daughter, and by his second wife Vellayyammal, two daughters. The first defendant is one of the sons of Swami, the other son being the 11th defendant.

Chinnasami died in or about 1907, Periasami died on 14th June, 1926, leaving him surviving Vellayyammal and his three daughters. Meenakshi died on 26th August, 1942.

After the death of Kolanda Karuppa Kandar, Chinnasami, the father of the plaintiff, filed a suit O.S. No. 10 of 1892, in the Court of the District Judge of Salem against his three brothers for a partition of the family properties. This suit ended in a reference to arbitration, and an award was the result. In spite of this, however, in 1895, Chinnasami and Periasami filed two suits, O.S. Nos. 24 and 25 of 1895, respectively, in the District Court of Salem for recovery of their respective one-fourth shares, together with mesne profits. These suits were concluded by a razinama dated 21st December, 1896 and marked as Ex. P.-1 in the case. A decree was passed in accordance with the razinama on 6th January, 1897. The razinama contained separate lists of properties falling to the respective shares of the four brothers and provided that pattas in respect of the respective properties shall be transferred to their respective names.

As already stated, Chinnasami died in or about 1907, leaving behind him his widow Meenakshi and his two daughters including the plaintiff. On Periasami's death in June 1926, disputes arose between Vellayyammal, the widow of Periasami, and Meenakshi, the widow of Chinnasami on the one side, and Appavu Kandar, the first defendant on the other side. The disputes came to a head when the two widows filed a suit O.S. No. 45 of 1926 in the Court of the District Judge of Salem against the first defendant in the main, though the other members of the family and their servants were added as party defendants. The plaint proceeded on the basis that Periasami and Chinnasami had become divided in status on account of the consent decree already mentioned, that on the death of Chinnasami, his widow Meenakshi, became entitled to his properties and that on the death of Periasami, Vellayyammal, his sole surviving widow became entitled in like manner to her husband's property. The suit was resisted by the first defendant, and his defence was based upon two main allegations, namely, (1) as between Periasami and Chinnasami there was only a " paper partition " and it was never acted upon ; the lands were never divided nor enjoyed separately and the two brothers continued as members of a joint family. The legal position was stated as follows :

". . . . . inasmuch as there was a formal partition they should be deemed in law to have become reunited and all the incidents of a joint family attach themselves with the result that after the death of Chinnasami Kandar, Periasami Kandar became entitled to the whole property by virtue of survivorship."

(2) Periasami at the time of his death expressed his desire that he (the first defendant) should manage all his properties, maintaining the family in the same manner as he had been doing all along and handed over to him the keys of his saferoom. This expression of Periasmi's desire was described as amounting to an oral will in favour of the first defendant appointing hin as an executor.

Sometime prior to the institution of this suit, the two widows executed a general power-of-attorney (Ex. P. 4) in favour of one Nataraja Kandar and Samiappa Kandar who happened to be also the husband of the plaintiff to manage their properties and affairs. Apparently Nataraja Kandar was also assisting the widows in the litigation. This Nataraja Kandar, however, appears to have behaved in a manner prejudicial to the interests of the widows, and on 8th December, 1926, the widows purport to cancel the power in his favour (Ex. P. 5). On 8th February, 1927, these two widows and the first defendant filed into Court a razinama (Ex. D. 5). As the terms of this razinama are of great importance in deciding this appeal, they are set out in full :

" Whereas we the plaintiffs 1 and 2 are women and whereas Natesa Kandar in whose favour we had executed power-of-attorney has deceived us, we, as decided by the mediators, have conveyed the suit properties and the whole of the remaining properties to the first defendant himself with absolute rights, in accordance with the dying wish of Periasami Kandar, husband of Individual No. 1. In future, he should protect and take care of us. The first defendant himself, shall get the entire properties with absolute rights and administer. We have cancelled even heretobefore, the power-of-attorney executed jointly to Nataraja Kandar and Samiappa Kandar. Plaintiffs 1 and 2 do not accept any of the proceedings taken by him. The first defendant himself shall receive the entire moveables and cash which had been entrusted by plaintiffs 1 and 2 with the said Nataraja Kandar. Plaintiffs 1 and 2 have no other right in the properties except the right to maintenance. To this effect is the razinama entered into between the first and second plaintiffs and the first defendant. We pray that a decree may be passed in terms of the razinama."

A decree was passed on 7th March, 1927, in terms of the compromise (Ex. D-6). There is evidence to show that the first defendant, Appavu Kandar, took proceedings in furtherance of his rights obtained under the compromise decree.

In 1929, two of the daughters of Vellayyammal filed O.S. No. 4 of 1929 in the Court of the District Judge of Salem for a declaration that the arrangement by way of compromise entered into on 7th March, 1927, was not valid beyond the lifetime of Vellayyammal and did not bind them as the reversionary heirs to the estate of Periasami. Nothing came out of this suit, which was withdrawn and dismissed on 19th August, 1929 (Ex. D-14). Nothing of importance happened thereafter till 1939, when Meenakshi and Vellayyammal filed two suits, O.S. Nos. 46 and 47 of 1939, respectively, in the Court of the Subordinate Judge of Salem to set aside the compromise decree in O.S. No. 45 of 1926 and to recover possession of the properties respectively belonging to Chinnasami and Periasami. These two suits also never came up for trial. Compromise decrees were passed on 14th December, 1940, in terms agreed upon between the contesting parties *vide* (Ex. P. 8-a). The preamble to the terms of the compromise was more elaborate than in the compromise which concluded O.S. No. 45 of 1926. It was expressly stated that from enquiries made it was learnt that Periasami and Chinnasami were as a matter of fact living as members of a joint family without partition being effected even though as per Court records partition had been effected, that Periasami got the entire properties on the death of Chinnasami and had a right to make a will and he gave away all the properties by an oral bequest to Appavu, the first defendant, and that there was no ground for having the compromise decree in O.S. No. 45 of 1926 set aside. The main terms were that in consideration of the plaintiffs giving up their relief of setting aside the compromise decree they should be allotted together 10 acres 47 cents, the income of which was to be enjoyed in equal shares by them for their maintenance. Meenakshi died on 26th August, 1942 and on 17th November, 1943, her daughter the plaintiff, commenced this litigation with a petition for leave to institute the suit *in forma*

pauperis. This petition was subsequently registered as a suit O.S. No. 33 of 1944 on the 13th March, 1944 and was decreed on 29th March, 1945.

The main pleas of the legal representatives of the first defendant were firstly, that though Chinnasami and Periasami were divided in 1896 shortly after the decree in the partition suit, they became reunited and lived as members of a joint Hindu family and on the death of Chinnasami in 1926, Periasami became entitled to all the properties by survivorship ; secondly, the compromise in O.S. No. 45 of 1926 is binding on the plaintiff as it was a true, *bona fide* and voluntary compromise and also operated as a *bona fide* settlement of doubtful claims.

The following issues cover the first plea :

(1) Was there any reunion between Chinnasami and Periasami?

(2) If the reunion is true, has plaintiff any right of suit?

There can only be one answer to the question raised by issue 2, namely, that if the reunion is true, the plaintiff must fail in her action. Whatever right Periasami's widow might have if the oral will set up by the first defendant is not true, the plaintiff's mother, Meenakshi, would have had no rights except the right to maintenance, and the plaintiff herself would have no right whatever.

It is a matter of admission by defendants 12 to 15, the legal representatives of the first defendant, that the decree in O.S. Nos. 24 and 25 of 1896 disrupted the joint status between Chinnasami and Periasami. A perusal of Ex. P.-1 the compromise clearly demonstrates the fact that there was a division *inter se* between each of the four brothers. There is a separate list for each brother with provision for separate enjoyment. From the allegations in the two plaints in O.S. Nos. 24 and 25 of 1896 it also appears that in pursuance of the award made by the arbitrators in O.S. No. 10 of 1892, each brother was put in possession of at least some of the properties which fell to his share according to the award (*vide* paragraph 6 of Ex. D-22 and paragraph 6 of Ex. D-22-*a*). The question then is whether as alleged in the written statement of defendants 12 to 15, Chinnasami and Periasami became reunited " shortly after the decree ". No further details are given as to the date from which they lived as members of a reunited family. It must also be observed that though the present written statement contained a specific plea of reunion in fact shortly after the decree, in the earlier written statement filed by the first defendant in O.S. No. 45 of 1926 the plea was put differently, in paragraph 3 (Ex. P. 5-*a*) thus :

> " . . . . . . As between Periasami Kandar and Chinnasami Kandar, there was only a paper partition and it was never acted upon. The lands of the two brothers were never divided by metes and bounds nor were they at any time enjoyed separately by them. The two brothers continued as members of a joint family and inasmuch as there was a formal partition they should be deemed in law to have become reunited and all the incidents of a joint family attach themselves with the result that after the death of Chinnasami Kandar, Periasami Kandar became entitled to the whole property by virtue of survivorship."

In a later written statement in O.S. No. 46 of 1938 (Ex. P.-8) the plea was identical with the plea set out in the present written statement.

Be that as it may, as the case now specifically put forward by the contesting defendants is a reunion shortly after the decree in O.S. No. 24 of 1895, it is necessary to deal with it. It is now well established that after a partition, the presumption would be against a reunion and that a reunion must be strictly proved as any other disputed fact. Reunion can be proved by subsequent conduct of the parties, but to establish it, it is necessary to show not only that the parties already divided lived together, but that they did so with the intention of thereby altering their status and forming a joint estate with all its usual incidents. (Vide *Venkataramayya* v. *Tatayya*[1].)

Though there was some oral evidence adduced on behalf of the appellants in the lower Court, their learned advocate did not place any reliance on it before us.

1. (1943) 2 M.L.J. 83.

He also frankly conceded that there was no positive documentary evidence on record to establish reunion. He relied almost entirely on certain statements made by Meenakshi, the plaintiff's mother, both as admissions and as statements admissible under section 32 (3) of the Indian Evidence Act. Chronologically, the first of such statements is contained in a report of the village magistrate of Nanjai Edayar village on 19th June, 1926 (Ex. P. 4-*a*) five days after the death of Periasami. Five individuals including Meenakshi and Vellayyammal the widow of Periasami, appeared before him and deposed among other things that Appavu, the first defendant was trying to commit trespass on property belonging to them without any manner of right, that a civil suit had been instituted about 30 years ago and a partition was brought about and pattas also issued, and that they had been in enjoyment of the remaining property separately. The ladies requested the munsiff to make necessary arrangements to safeguard their properties and their persons. There is certainly nothing in this report to help the appellants. But they rely on a statement made in writing by the plaintiff's mother Meenakshi, on the same day, Ex. D-1. The material part of the statement is as follows:

> "We five individuals, that is to say, the five individuals referred to in the report of the village munsiff went to-day and represented to the village munsiff. The facts set out therein are true. My husband and late Periasami Kandar remained as members of a joint family up to this date . . . . A partition has been effected between the said Appavu Kandar vagaira and ourselves. Karar also has been entered into. We request that our properties may be safeguarded . . . ."

The Tamil original for the words "as members of a joint family" are "ஒரு குடும்ப மாய்த்தான்". We do not agree with the appellant's contention that there is any admission on the part of Meenakshi that subsequent to the division in 1896, the two brothers became reunited. It is common ground that after Chinnasami's death, Periasami was himself in management of the properties of his divided brother as Meenakshi had no other male help. Moreover, we do not consider it safe to place much reliance on this statement alone without taking into account the statement recited in the report of the village magistrate and the statement made by Meenakshi on oath before the Sub-Magistrate on 20th June, 1896 (Ex. P.-4-*c*). Therein she categorically stated as follows:

> "The deceased Periasami Goundan and my husband are brothers. Partition had been effected between brothers. But on my husband's death, Periasami Goundan himself was in management of my properties also . . . . . . My properties also are together with the deceased Periasami Goundan's."

On the same day, Vellayyammal, the widow of Periasami also made a statement on oath before the Magistrate Ex. D-2 in which she said:

> "A deed of partition had been entered into between my husband and Chinnasami Goundan, younger brother of my husband. But both the families are living together. My husband had been managing the properties of my husband's younger brother also."

In the proceedings passed by the Second Class Magistrate, Paramathi, under section 144, Criminal Procedure Code, on 21st June, 1896 (Ex. P.-4-*f*) he says that Chinnasami died more than 20 years ago and that though divided from him, his properties had been managed by Periasami himself, with whose family the members of Chinnasami's family also lived. Having regard to all these contemporaneous statements, it is impossible to understand the statement in Ex. D-1 to mean that Meenakshi admitted that there was a reunion between Chinnasami and Periasami after the partition decree in 1896.

The statements of Meenakshi in Ex. P.-4, the power-of-attorney, and in Ex. D.-4, the plaint in O.S. No. 45 of 1926, do not certainly help the appellants. Paragraph 6 of the later is unequivocal and runs thus:

> "On the death of the said Chinnaswami Kandar his properties devolved upon the second plaintiff, his widow, but the same was entirely under the control and management of the said Periasami Kandar."

It has already been mentioned that this suit ended in a compromise. In the razinama, Ex. D-5, in terms of which a decree was passed, there is no statement about reunion.

The only other statement made by Meenakshi on which considerable reliance was placed by the appellants is contained in the memorandum of compromise filed in O.S. No. 46 of 1939 (Ex. D-24). The material portion occurs in the preamble :—

"...... Whereas from enquiries now made by us in the viillage it is learnt that Periasami Kandar and Chinnasami Kandar .... were as a matter of fact living as members of a joint family without partition being effected even though as per Court records partition had been effected, whereas after the demise of the said Chinnasami Kandar, Periasami Kandar got the entire properties and was in enjoyment of the same."

It must not be forgotten, however, that this compromise was filed in a suit instituted by Meenakshi herself to set aside the compromise decree in O.S. No. 45 of 1926.

It is difficult to see how the statement can be taken as an admission of reunion between the two brothers binding on the plaintiff. The plaintiff does not claim title under her mother. She is not her mother's representative in interest. The learned Advocate for the appellants in the alternative contends that the statement would be a statement against the interest of Meenakshi and therefore would be admissible as substantive evidence under section 32 (3) of the Indian Evidence Act. Assuming that it is admissible as such, we find it very unsafe to place any reliance on it, as Meenakshi has never been consistent in her statements. She has made unambiguous statements against the case of reunion put forward by the appellants at other times, and that fact should not be completely overlooked in assessing the value of any statement made by her in the memorandum of compromise filed in 1940.

The appellants have therefore failed to establish the case of reunion set up by them in their written statement. But apart from any onus of proof, there is sufficient documentary evidence on record to conclusively establish that there could never have been any reunion between Chinnasami and Periasami. There can be no doubt that the decrees in O.S. Nos. 24 and 25 of 1896 effected a severance in status between the two brothers, if the prior award had not already done so. Ex. P-2 is a list of documents purported to have been executed by or to Chinnasami alone between 1896 and 1904. Ex. P-3 is a similar list relating to Periasami for the period from 1st January, 1896 to 31st December, 1906. These lists show that each brother was having separate transactions of his own. Such independent transactions during a long period up to the date of the death of Chinnasami render it extremely improbable that Chinnasami and Periasami were living together as members of a reunited joint family. The conduct of parties after Chinnasami's death in or about 1907 is very significant. We have in evidence extracts from the Chitta of Najai Edayar village, Exs. P-9 and P-10 series, which show that pattas 106 and 309 stood in the name of Meenakshi while pattas Nos. 67, 151 and 142 stood in the name Periasami. The pattas in the name of Meenakshi contained lands which went to the share of Chinnasami according to the partition decree, while Periasami's patta included lands which fell to his share. Appavu, the first defendant, in the written statement filed by him in O.S. No. 46 of 1939 (Ex. P-8) admits these facts in paragrah 5, but states that though the management of the properties was with Periasami the pattas of some of the properties stood in the name of Meenakshi and that it should have been for some ulterior purpose. What that ulterior purpose was he does not say. The transfer of patta in favour of Meenakshi after her husband's death is impossible to reconcile with a state of reunion between the two brothers. There is thus not only no evidence on behalf of the appellants to establish reunion, there is positive evidence that there never was any reunion in fact. We have no hesitation in agreeing with the finding of the trial Court on this point.

Issue 3 covers the next plea of the appellants. It runs as follows :

"If the reunion is not true, are the compromises entered into by the plaintiff's mother with the first defendant binding on plaintiff or are the family arrangements binding on plaintiff?

Several decisions of the Judicial Committee as well as the Courts in India were cited by learned counsel on either side on this point. From these decisions, the following propositions can be held to be fairly established :

(1) Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir. (*Kathama Nachiar* v. *Rajah of Sivaganga*[1] and *Vaidhyalinga Mudaliar* v. *Srirangathanni*[2].)

(2) This rule is not limited to a decree in a suit contested to the end, but would also extend to a decree based on a compromise, provided the compromise was made *bona fide* for the benefit of the estate and is reasonable and prudent. The limited owner is not bound at her peril to pursue litigation to the ultimate Court of Appeal. (*Mohendra Nath Biswas* v. *Shamsunnissa Khatoom*[3], *Ramsumran Prosad* v. *Shyam Kumari*[4] and *Raoji Rujia* v. *Kunjalal Hiralal*[5].)

(3) A compromise is *a fortiori* not *bona fide* if it was entered into solely for the personal advantage of the widow or if the benefit under the compromise was secured by a party without any belief that he had a valid claim. (*Kondama Naick* v. *Kandaswami Gounder*[6] and *Appasami Pillai* v. *Thayammal*[7].)

(4) A compromise, the terms of which amount to an entire abandonment by the limited owner of the rights of the reversion, cannot be binding on the reversioners. (*Imrit Kanwar* v. *Roop Narain Singh*[8].)

It was contended by Mr. T. M. Krishnaswami Aiyar, the learned advocate for the appellants, that the only condition which had to be satisfied for a compromise by a limited owner to be binding on the reversioner was that the compromise should be *bona fide* in the sense that it was not a dishonest compromise and it was not brought about solely for the personal advantage of the limited owner. We are not inclined to agree with him that this is a complete statement of the law applicable to the case. A compromise entered into by a limited owner on behalf of the estate cannot be binding on the reversioner unless it is " reasonable and prudent and for the interest of the estate". In every reported case, the Court has examined the terms of the compromise to ascertain whether in the circumstances of the particular case the terms could be held to be reasonable and prudent and for the benefit of the estate.

In *Ramsumran Prosad* v. *Shyam Kumari*[4], certain immoveable properties were brought to sale by a Hindu widow under a mortgage decree for Rs. 1,47,000 obtained by her in a suit commenced by her deceased husband, and she purchased them at the auction for Rs. 65,075. The judgment-debtors filed objections to the sale, and the widow entered into a compromise with them whereby they were allowed to sell four of the properties for Rs. 66,000 to be paid over to her, and she was allowed to sell the other two properties, which were likely to realise Rs. 5,000. Their Lordships of the Judicial Committee discussed the value of the property released, and after coming to the conclusion that all that the widow gave up was Rs. 3,000 out of Rs. 69,000 to buy off the opposition of the judgment-debtors, their Lordships then held that the terms were in the circumstances reasonable. It is sufficient to refer to the latest reported case, on the point, of our Court, namely, *Perireddi* v. *Venkatraju*[9], in which a compromise by the widow was upheld because in the opinion of the learned Judges,

> " she acted properly and providently in partially recognising those (opponents') claims and in entering into a settlement whereby she secured and retained a substantial portion of the estate and avoided a costly and protracted litigation with its attendant uncertainties."

We have not come across any case in which a Court has upheld a compromise made by a limited owner without holding that the terms of the compromise were reasonable and for the benefit of the estate.

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1. (1863) 9 M.I.A. 539.
2. (1925) 49 M.L.J. 769 : L.R. 52 I.A. 322 : I.L.R. 48 Mad. 883 (P.C.).
3. (1914) 27 I.C. 954.
4. (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 : I.L.R. 1 Pat. 741 (P.C.).
5. (1930) 58 M.L.J. 720 : L.R. 57 I.A. 177 : I.L.R. 54 Bom. 455 at 458 (P.C.).
6. (1923) 46 M.L.J. 172 : L.R. 51 I.A. 145 : I.L.R. 47 Mad. 181 (P.C.).
7. (1939) 2 M.L.J. 236.
8. (1880) 6 C.L.R. 76.
9. (1947) 2 M.L.J. 87 : I.L.R. (1947) Mad. 681.

That a compromise the result of which is a complete negation of the rights of the reversion cannot be held to be a compromise binding on the reversioners is illustrated by two decisions of the Privy Council. One of them is in the early case of *Imrit Kanwar* v. *Roop Narain Singh*[1]. In that case, a claim was made in virtue of an alleged adoption to the estate of the deceased Hindu. The widow made a compromise with the claimant wherein the adoption was admitted, the widow was allowed to enjoy the entire property for her life without power of alienation, and after her death the ancestral estate was agreed to be taken by the claimant and not by the daughters who would have been entitled to it if the adoption were not true. The Judicial Committee held that the daughters who were the reversioners could not be bound by this compromise. Referring to this case, their Lordships in *Ramsumran Prosad* v. *Shyam Kumari*[2] say as follows :

> "In a dispute between a person claiming to be an adopted son of the previous owner and the widow and her daughters who would have titles after her, the widow gave up her daughters' rights in consideration of her own remaining practically unimpaired. Such a compromise obviously could not stand ; indeed it is not a compromise at all."

The other decision is in *Nathulal* v. *Babu Ram*[3]. Though the actual decision in the case is not directly in point, there are observations which are extremely apposite to the facts of the present case. On the death of one of two brothers, members of a joint Hindu family, the surviving brother claimed that he had been joint with his brother and that the whole of the property passed by survivorship to him, so that the widow of his deceased brother took nothing by inheritance. The matter was referred to arbitrators who, by their award, which was signed by both parties in token of acceptance, and which found that the two brothers had been joint, divided the joint property between the parties in certain unequal proportions. It was found by their Lordships that the brothers were undivided and the property passed by survivorship to the surviving brother. On that footing, their Lordships upheld the award. But then they proceed to consider what the decision would have been if the facts had been otherwise. Their Lordships say :

> "No doubt, had the facts been that Ji Sukh at the time of his death was separated from his brother, this award could have availed the plaintiffs nothing against a claim by Ji Sukh's reversioners. On the face of the transaction it is not such a compromise by a Hindu widow as could be held binding upon her husband's reversioners. In the present case, however, as it has been established that Ji Sukh at the date of his death left no heritable interest in the property in suit, the sole question decisive of the rights of the parties is the true construction of the bargain made by Mussamat Jamma (widow) with Ram Sahai . . . . By the bargain which she drove the reversioners of her husband were not damnified. She did not bind them or represent them, and she was not their agent or trustee to acquire property for her husband's estate."

In the light of these decisions, it cannot be said that the compromise entered into by Meenakshi Ammal with the first defendant was for the benefit of the estate or was reasonable and prudent. She was evidently well aware of her rights. She refers to the fact of partition and separate living in her statements before the village munsiff and before the Magistrate. She must have been aware of the transfer of patta in her name in respect of her husband's properties after his death. The Sub-Magistrate who had passed proceedings under section 144 of the Criminal Procedure Code, observed that the brothers, Chinnasami and Periasami, were divided from each other, but after Chinnasami's death his properties had been managed by Periasami, with whose family the members of Chinnasami's family also lived. In Ex. P-4, the power-of-attorney, there is an unambiguous recital that after Chinnasami's death his moveable and immoveable properties and money dealings belonging to him were being enjoyed by Meenakshi by right of heirship, but as she was a female and found it difficult to be in management, Periasami was managing them at her request. In the leases executed in July, 1926 (Exs. P-6 and P-6-*b*), the fact that some of the lands covered by them were comprised in a patta standing in the name of Meenakshi Ammal is expressly mentioned. The plaint in O.S. No. 45 of 1926 contains a definite statement of

1. (1880) 6 C.L.R. 76.
2. (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 : I.L.R. 1 Pat. 741 (P.C.).
3. (1936) L.R. 63 I.A. 155 (P.C.).

her case. All these facts must have been known to Appavu also. While so, it is difficult to understand the conduct of the widows, hardly six months after the institution of the suit. The only thing that happened appears to be that the widows began to suspect the conduct of Nataraja Kandar who had been helping them in the management of their properties and in the conduct of the litigation. The widows cancelled the power-of-attorney in his favour on 8th December, 1926 and two months thereafter entered into the compromise. Analysing the terms of the compromise, they come to this : the widows completely abandoned all their claims to the entire properties left by both Chinnasami and Periasami. There is a mention of the right of the widows to maintenance, but there is no definite provision in regard to this. Mention is only made in the negative way, namely,

> " Plaintiffs 1 to 2 have no other right in the properties except the right to maintenance."

The only right asserted on behalf of the first defendant is on the basis of the dying wish of Periasami. There is no recital of a reunion between Chinnasami and Periasami. The dying wish, even if it were translated into an oral will, might cover the properties belonging to Periasami, but the properties left by Chinnasami would not be affected by it unless there had been a reunion and they had passed by survivorship to Periasami. This fact is not even alleged. The result of the compromise is that the first defendant gets every thing and the widows practically nothing. Their right to maintenance is not a big concession by the first defendant, because he had never denied that obligation. We have now held that there was no reunion between the two brothers. A compromise by which the entire right of the reversion was surrendered without any corresponding benefit to the estate can in no sense be held to be reasonable or prudent. It may be that the widows, without any adequate help, were unable to successfully fight the powerful Appavu. It may be they wanted to be left in peace with a provision for their maintenance. If so, they were then only looking to their personal advantage and not to the interests of the estate. In a case similar to this, *Nirman Bahadur* v. *Fateh Bahadur*[1], Mukerji, J., went to the length of holding that in entering into such a compromise she was not representing the estate. The learned Judge says,

> " Where, by way of compromise, the widow says that her husband died joint with the opposite parties and, therefore, she is not entitled to possession and is entitled only to a maintenance, it cannot be said that the widow ' represented the estate ' and a compromise honestly arrived at by her would bind the reversioners. The reason is very simple. The moment the widow says that her husband died joint, she disclaims all title to represent her husband's estate for on her own admission there is no estate to represent."

Whether this extreme view is maintainable or not, it is evident that such a compromise cannot be a reasonable and prudent compromise. We agree with the learned trial Judge that a compromise was not binding on the reversioners.

The fact that subsequently Meenakshi Ammal attempted to have the compromise decree set aside but again compromised that suit accepting the original compromise does not carry the matter any further. Under the latter compromise, she obtained about 5 acres to be enjoyed by her during her lifetime in lieu of her maintenance but this fact cannot render the compromise valid. It may be recalled that in the case of *Imrit Kanwar* v. *Roop Narain Singh*[2], the widow obtained an estate for life in the entire properties. Nevertheless, the Judicial Committee held that the compromise was not binding on the reversioners.

Mr. T. M. Krishnaswami Aiyar, the learned advocate for the appellants strongly relied upon certain decisions as supporting his case. The first of such decisions is that in *Mohendranath Biswas* v. *Shamsunnessa Khatun*[3]. In that case, a suit was filed by two daughters claiming certain lands as forming part of the estate of the last male holder, their father. That suit was dismissed by the trial Judge on the ground that the claim was not established on the merits and that it was barred by limitation. An appeal was preferred by one of the daughters, but it was withdrawn by her. It was found that the withdrawal was not the result

1. (1929) I.L.R. 52 All. 178.
2. (1880) 6 C.L.R. 76.
3. (1914) 27 I.C. 954.

of any collusion, but it was contended that that withdrawal was in the nature of a compromise and was therefore not binding on the reversioner. Repelling this contention, the learned Judges say that the view cannot be defended on principle that a qualified owner like the Hindu widow, daughter, or mother, is bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal and that she cannot *bona fide* effect a settlement of the matter in controversy

> " even though such a compromise be in the best interest of the estate."

In this case, there was a decision of a competent Court against the limited owner and she did not pursue the matter in the ultimate Court of Appeal; it cannot be said that her action was unreasonable or imprudent. In the case before us, no attempt was made to have a fair trial. The decision of the Judicial Committee in *Risal Singh* v. *Balwant Singh*[1] was relied on by him. But on an analysis of the facts of that case, it is clear that the principle of that decision has no application to the facts of the present case. There, a Hindu widow adopted a son to her husband. A reversioner challenged the adoption in a suit in which she pleaded that she had authority to make the adoption and that it was valid. The suit was dismissed because the plaintiff was found not to be a reversioner. The widow thereafter brought a suit against the adopted son to set aside the adoption on the ground that she did not have authority from her husband to adopt and even denied the adoption. The adopted son contested the suit, and it was decided by the Courts in India that the widow was estopped from maintaining her plea. On appeal, the Privy Council raised an issue as to her authority to adopt and held on the evidence that the adoption was valid. In a subsequent suit by an alleged reversioner to the estate of her husband against the adopted son, it was held notwithstanding the personal estoppel which bound her the widow did represent the estate on the question of fact as to whether the defendant had or had not been validly adopted and that she represented it within the meaning of the rule laid down in the *Sivaganga case*[2]. It is enough to mention that in that case the adoption was held valid after a "fair and honest" trial on the merits, to distinguish it from the present case. The decision in *Ravji Andu Nikam* v. *Rama Krishna Mane*[3] was rendered after the ruling of the Privy Council in *Ramsumran Prasad* v. *Shyam Kumari*[4] and does not carry the matter any further. In that case, a person died leaving a will under which he devised his entire estate to his sister's son but left behind him his widow and daughter. After his death, the matter was referred to arbitrators. The widow admitted the will, but her contention was that it was effective only if the daughter were married to the legatee. An award was made and a decree followed thereon. In a suit filed by the adopted son of the testator it was contended that the widow had no legal authority to admit the will. This contention was repelled. There is nothing in law which precludes a widow from admitting a fact. If her husband really left a will, it would be exceedingly strange to hold that law compels her to deny the will and to carry on a litigation impeaching the will. There was no dispute as to the genuineness or validity of the will. The learned Judges held that the course she took apparently was a reasonable one in the interests of the estate. The learned Judges point out that the matter was fairly and *bona fide* considered at the time of the award and decree, and it was not till many years afterwards, when the parties began to quarrel, that it was suggested that the will was not a proper will. In the case before us, the facts are just the reverse. We start with a dispute and with a definite assertion on behalf of the widow of a case which we have found to be established. There was no fair consideration of the claim of the estate which was practically abandoned. This decision cannot help the appellants. Nor we do think that the decision in *Ranee Hurieshwari Koer* v. *Secretary of State*[5] helps the appellants. It was there laid down that an admission

1. (1918) I.L.R. 40 All. 593.
2. (1863) 9 M.I.A. 539.
3. A.I.R. 1928 Bom. 14.
4. (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 : I.L.R. 1 Pat. 741 (P.C.).
5. A.I.R. 1937 Pat. 374.

of fact by a widow creating an estoppel, as opposed to an admission of law will, in the absence of fraud or collusion, create an estoppel which will bind the reversioners. In a suit by a lessee against a widow for possession of property leased to him by her husband, the widow admitted the lease and a decree was passed fairly and properly. It was held that the decree was binding on the reversioners. There is one statement however, in the judgment of the learned Chief Justice which is decidedly against the appellants. At page 376 Courtney Terrell, C.J., says :

> " Nor was the decree passed on the basis of a compromise by Asmedh Koer. Had it been so, the appellant might justly have urged that it was one which did not bind the reversioners."

There remains only the question whether the plaintiff has established that the items claimed by her belonged to her father, Chinnasami at the time of his death. The appellants do not dispute certain of the items. We shall deal in brief with respect to the items disputed by them. Items 1, 2, 3, 7 and 8 are not found in the list of properties set apart for Chinnasami in Ex. P-1 the compromise. This may be so, but we know that Chinnasami was acquiring properties subsequent to the partition. We find all these items mentioned in Ex. P-9, an extract from the Chitta for 1918, as being comprised in the patta in the name of Meenakshi. The same consideration applies to the extent of item 9 which according to Ex. P-1 was only 5.31 acres, whereas the extent in Ex. P-9 is 7.55 acres, which is the extent now claimed. As regards item 17, there does not appear to be any difference between learned counsel on either side here, and the learned Advocate-General has no objection that the decree may be so modified as to make it clear that only one half of item 17 should be recovered by the plaintiff. The appellants object to items 11 and 13 on the ground that only half of these items fell to the share of Chinnasami, but this objection was based evidently on a mistake, and there is no substance in this objection. In respect of items 10, 14 and 16 the learned Advocate-General admits that on the evidence on record it is not manifest how they came to be owned by Chinnasami. We therefore call for a finding from the learned Subordinate Judge whether these items or any of them form part of the properties left by Chinnasami. The parties should be permitted to adduce additional evidence as regards those items only. Time for return of findings two months ; one week for objections thereafter.

B.V.V. *Finding called for.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

Y. L. Paul .. *Petitioner**

v.

G. C. Joseph and another .. *Respondents.*

Arbitration Act (IX of 1899), sections 10 (2), 14 and 17—Award signed by fourteen out of fifteen arbitrators—Validity—Application to set aside award barred by time—Right to resist filing of award.

According to the provisions of section 10 (2) of the Arbitration Act a reference must be regarded as one expressly containing a provision that the award of the majority shall prevail when there is no provision to the contrary in the reference. In the absence of such a provision, when all the fifteen arbitrators were present and took part in the deliberations preceding the making of the award but only fourteen signed the award it cannot be said the failure of one of the arbitrators to sign the award is fatal to its validity by reason of section 14 of the Act.

A party barred by limitation from making an application to set aside an award cannot either resist the filing of the award or show grounds upon which the award can be set aside.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Bezwada, dated 9th October, 1945, in O. P. No. 22 of 1945.

K. Kameswara Rao and *N. Rammohana Rao* for Petitioner.

G. Venkatarama Sastri for Respondents.

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* C.R.P. No. 921 of 1946. 19th December, 1947.

The Court delivered the following

JUDGMENT.—This is an application to revise an order of the District Munsiff of Bezwada directing a decree to be passed in terms of an award dated 26th November, 1944. The dispute in which this award was given was one between two brothers in respect of business they carried on under the name or style of " Y. L. Mark, Paul and Co." They were engaged on military contracts. The dispute was admittedly referred to 15 persons who made an award on the 26th November, 1944. The President of the arbitrators, or Umpire, as he has been referred to for convenience in the Court below, filed the award in Court under the provisions of section 14. It has been found that the parties were given notice, both of the making of the award and of its filing in Court. The present applicant, one of the brothers, objected to the passing of the decree on a number of grounds of which three have been agitated again before me. In the first place, he objects on the ground that admittedly, only 14 of the 15 arbitrators signed the award. This, he says, is fatal to the validity of the award by reason of the provision of section 14 of the Arbitration Act. I do not consider that there is any substance in this objection. By section 10 (2) of the Act the reference in this case must be regarded as one expressly containing a provision that the award of the majority shall prevail, as there was admittedly no provision to the contrary in the reference. Here 14 of the 15 arbitrators have signed the award and it has been found that, in fact, all the 15 were present and took part in the deliberations preceding the making of the award. In these circumstances, I am satisfied that the award must be regarded as valid and binding, inasmuch as it is signed by a majority of the arbitrators. With great respect I agree with the decision in *Raghubir Pandey* v. *Kaulesar Pandey*[1], where the authorities on this point have been dealt with at length.

The second objection arises from the applicant's contention that he is entitled to show grounds upon which the award can be set aside, notwithstanding, as is admitted, that he is barred by limitation from making an application with that object. His objection on this ground was not filed until the 28th April, 1945, whilst the award was made on the 26th November, 1944, and it was filed in Court on the 24th February, 1945. Thus, it is clear that the applicant was not entitled to apply to set aside the award on the 28th April, 1945, when he filed his objections. It is urged on his behalf, however, that he is nevertheless entitled to resist the filing of the award. Again, I cannot accept the contention. I am satisfied that such a contention must fail in view of the provision of section 17 of the Act a mandatory provision—that the Court should proceed to pronounce judgment according to the award when the time for making an application has expired.

The third and last objection raised is that the so-called award was not a final conclusion. I have perused the award and it is clearly of a final and conclusive nature.

Accordingly, I hold that the three objections raised are without substance and in any case I am satisfied that there is here no ground which could possibly be regarded as ground for interference in revision. The application is therefore dismissed with costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Pedda Muni Reddi and another .. *Petitioners.**

Penal Code (XLV of 1860), sections 353 and 352—Head constable having no written warrant trying to arrest a person—Use of criminal force against—If an offence.

Where a head constable attempts to arrest a person on suspicion without the necessary warrant in writing required by section 56 (1) of the Criminal Procedure Code, the use of criminal force by

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1. (1944) I.L.R. 23 Pat. 719.

* Cr.R.C. No. 1278 of 1947. (Cr.R.P. No. 1163 of 1947). 11th March, 1948.

the person suspected against the head constable will not amount to an offence under section 353 of the Penal Code. If the action of the public servant was not valid in law, using criminal force, against him would not amount to an offence under section 353. Where the head constable did not purport to arrest on his own account it cannot be contended that an offence under section 353 was committed as the officer could arrest a person suspected of a cognisable offence without a warrant. In the circumstances even if a relation of the person sought to be arrested tries to prevent the arrest by using force or threatening to use force, such an act cannot come within the ambit of section 352 of the Penal Code.

Doraiswami Pillai v. *Emperor*, (1903) 13 M.L.J. 285 : I.L.R. 27 Mad. 52 and *Gulabi Mahto* v. *Emperor*, (1940) 41 Cr.L.J. 742, referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate, Hozur, dated 14th November, 1947, and made in C. A. No. 72 of 1947, preferred against the order of the Court of the Stationary Sub-Magistrate, Hozur, in C. C. No. 509 of 1947.

T. M. Venugopala Mudaliar for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Court made the following

ORDER.—The learned Public Prosecutor, at the very outset, conceded that the conviction and sentence of the second accused cannot be sustained on the evidence in the case, for, on the finding that there was no arrest effected, there can be no overt act attributable to him which would justify a conviction under section 353 of the Indian Penal Code. His conviction and sentence are therefore set aside and he is acquitted.

With regard to the first accused, it is contended on his behalf by Mr. T. M. Venugopala Mudaliar that in view of the finding by the lower appellate Court to the effect that the second accused was not actually arrested, the proper manner of looking at the case is to find out whether the head constable was justified in attempting to arrest. It is common ground, that the Sub-Inspector of Police had not given an order in writing in accordance with the provisions of section 56 (1) of the Criminal Procedure Code to P. W. 1 to arrest the second accused. Though the fact that P. W. 1 was deputed for that purpose was entered in the general diary, there was no evidence of it, as the general diary had not been produced and hence any oral evidence to prove the entry will be inadmissible. Therefore even if the Sub-Inspector orally directed P. W. 1 to go and arrest the second accused, since such a direction is not contemplated by the provisions of the Criminal Procedure Code and is in violation of the express provisions of section 56 (1), it should be deemed that the action of P. W. 1 in trying to effect the arrest was illegal.

The decision in *Doraiswami Pillai* v. *Emperor*[1] lays down that where a police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at the door to ascertain if he was there, whereupon he came out, abused and pushed the constable and lifted a stick as if he were about to hit the constable with it, an offence under section 353 of the Indian Penal Code, of using criminal force to deter a public servant in the execution of his duty, has not been committed. Bashyam Aiyangar, J., was of the view that in those circumstances the accused, would, no doubt, be guilty of assault or of using criminal force, unless his act could be regarded as done in the exercise of the right of private defence. On the facts of that case the learned Judge concluded that the constable in entering upon the accused's dwelling house and knocking at his door at midnight was technically guilty of house trespass and under those circumstances the accused was justified under section 104 of the Indian Penal Code in voluntarily causing the slight harm which he inflicted upon the constable. What follows from this decision is that if the action of the public servant was not valid in law, using criminal force against him would not amount to an

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1. (1903) 13 M.L.J. 285 : I.L.R. 27 Mad. 52.

offence under section 353, Indian Penal Code. Though this decision was not expressly referred to by Dhavle, J., of the Patna High Court in *Gulabi Mahto* v. *Emperor*[1] on circumstances resembling those in *Doraiswami Pillai* v. *Emperor*[2] and the present case that learned Judge was inclined to hold that an offence under section 353, Indian Penal Code, was not committed. What happened there was that, a Police Sub-Inspector asked the constable to bring certain persons with some papers to the police station, but did not give a direction in writing to that effect. On that direction when the constable tried to take one of the persons by force to the police station, such person resented it and followed the resentment by throwing brickbats. The Patna High Court was of opinion that the person could not be convicted under section 353, Indian Penal Code. It was argued in that case that even if the constables did not have a warrant, the offence suspected against the accused person was a cognizable one for which a police officer can arrest without a warrant. The learned Judge in answer to that argument observed that the constable in that case did not pretend on his own account to arrest the person just as in the present case also.

The learned Public Prosecutor put forward the same contention as had been advanced in the Patna case, *Gulabi Mahto* v. *Emperor*[1] also, *viz.*, that the offence with which the second accused was suspected being a cognizable one, the police officer can arrest without a warrant and that such being the case, even if there was no written authority as contemplated by section 56 (1) of the Criminal Procedure Code, P. W. 1 could, on his own accord, as a police officer arrest a person suspected of a cognizable offence without a warrant. The short answer to this argument, is, as Dhavle, J., remarks, that P. W. 1 did not purport to act on his own account.

The only other question that remains is whether in the circumstances of the case, the first accused can be held guilty of an offence under section 352, Indian Penal Code. On this aspect of the case, the evidence is meagre. If the finding of the lower Courts is accepted, as I have already done, that P. W. 1 had no authority to effect the arrest since there was no order in writing under section 56 (1) of the Criminal Procedure Code and if P. W. 1 did not purport to act on his own accord because there is nothing to show that the elements necessary to justify the action under section 54, Criminal Procedure Code, are present, the act of P. W. 1 was not that of public servant but an ordinary individual. It cannot be said that an ordinary individual can attempt to arrest a person in circumstances like the present and if a relation of the person to be arrested tries to prevent the arrest by using force or threatening to use force, such an act cannot come within the ambit of section 352, Indian Penal Code. I would therefore hold that no offence has been committed and the first petitioner (first accused) is also entitled to an acquittal. He is accordingly acquitted and set at liberty.

The bail bonds are cancelled.

K.S. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

A. Mohammad Hassan Sahib and others .. *Petitioners**

v.

The Podanur Sunnath Jamath by President C. A. Alli Sahib and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 8—Application for leave to sue in representative capacity—Large numbers on both sides contending respective rights—Duty of Court to decide the question of bona fide *nature of plaintiffs' claim to file the suit—Leave cannot be refused on the ground that parties are equally balanced.*

1. (1940) 41 Cr.L.J. 742.
2. (1903) 13 M.L.J. 285 : I.L.R. 27 Mad. 52.

* C.R.P. No. 249 of 1947. 3rd February, 1948.

In an application for leave to sue in a representative capacity, it was contended that the plaintiffs did not represent the general body of persons they purported to represent and each side produced about a hundred affidavits in support of their respective contentions. The lower Court refused leave simply because the parties were equally balanced.

Held, in revision, it was the duty of the Court to decide the question as to whether the plaintiffs' request was a *bona fide* one and whether they were agitating a proper claim. If the request was *bona fide* and the claim a proper one, leave should be granted. A decision without going into the question of the *bona fides* is materially irregular and has to be set aside.

Abdul Ghani v. *Subramania,* A.I.R. 1929 Mad. 44, relied on.

Periyava Nadar v. *Velumuruga Nadar,* (1920) 30 M.L.T. 47 ; *Rangasami* v. *Natesa,* A.I.R. 1935 Mad. 542 and *Commissioners of Sewers of the City of London* v. *Gellatly,* (1876) 3 Ch.D. 610, referred to.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsiff Court, Coimbatore, dated 14th November, 1946, in C. M. P. No. 342 of 1946 in O. S. No. 308 of 1946.

S. Thyagaraja Aiyar for Petitioners.

V. C. Viraraghavan for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners, five in number, purporting to represent the Muslim members of the Sunnath Jamath of Podanur, applied to the lower Court for leave under Order 1, rule 8 of the Civil Procedure Code to file a suit against the defendants who are said to be the representatives of a society styled "the Podanur Sunnath Jamath" registered under the Societies' Registration Act (Act XXI of 1860). The allegations are that the defendants have no legal status and that the rules and the agreement of the said society are therefore invalid and without any legal effect. On this application, the defendants filed a counter, stating among other matters that the petitioners did not represent the general body of the Muslims of Podanur and that the fifth petitioner who was an important individual in the locality was engineering the whole business. During the course of the hearing of this application, the petitioners filed 134 affidavits, each one of the deponents of those affidavits stating that the petitioners have got such representative status ; on the other hand, the respondents filed 97 affidavits, disputing the representative character of the petitioners to file the suit.

In this state of affidavit evidence before the lower Court, the learned District Munsiff held that the plaintiffs, and their supporters could only be permitted to sue in their individual capacity and not as representing any common interest of the community; and he therefore refused leave to the petitioners to file the suit on behalf of the community.

In this revision petition, Mr. S. Thyagaraja Aiyar, the learned advocate for the petitioners, contends that the learned District Munsiff acted illegally and with material irregularity in the exercise of his jurisdiction in not considering the question from the proper legal standpoint. The position of law enunciated by the learned District Munsiff is, it is contended, contrary to the rulings of this Court : and he invited my attention to a number of decisions of this Court as well as a judgment of Jessel, M.R., in the Chanchery Division in England. The law is well settled, as stated by the Master of the Rolls in *Commissioners of Sewers of the City of London* v. *Gellatly*[1], that where one multitude of persons were interested in a right and another multitude of persons interested in contesting that right and that right was a general right—and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number—some individuals out of one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim and the right might be finally decided as between all parties in a suit. I do not wish at this stage to discuss in any detail all the decisions, to which my attention has been drawn ; suffice it for the present purpose to refer to the judgment of Ananthakrishna Aiyar, J., in *Abdul Ghani* v. *Subramania*[2], wherein the learned Judge discusses the earlier deci-

1. (1876) 3 Ch.D. 610. 2. A.I.R. 1929 Mad. 44.

sions on the point and holds that the Court should not refuse leave to file a suit simply because there are, in opposition, quite a number of people contesting the plaintiffs' claim. It is not possible, even in an ideal society, to get unanimity of opinion on many matters and therefore the learned District Munsiff, in this case, ought to have considered the question regarding the *bona fide* nature of the plaintiffs' claim to file a suit. The decisions in *Periyava Nadar* v. *Velumuruga Nadar*[1] and *Rangaswami* v. *Natesa*[2] relate to instances, where the dispute was among the members of a certain multitude of individuals and not between one group against a third party. Even in such cases, it has been held that it is the duty of the Court to grant leave to the plaintiffs to sue on behalf of the particular group of persons if it was a *bona fide* request, and in such cases what the Court ought to do is to define a group of individuals among the defendants also, who can represent the opposite group.

The learned District Munsiff in this case has not gone into the question as to whether the plaintiffs' claim is *bona fide* and whether the plaintiffs are agitating a proper claim. Without deciding this question, he should not have, for the simple reason that the parties are equally balanced as it were, 134 on the one side and 97 on the other, refused the claim of the plaintiffs. In these circumstances, the order of the learned District Munsiff refusing permission to sue is set aside ; and the lower Court is directed to hear the matter afresh and decide whether the plaintiffs' claim is *bona fide* ; if the plaintiffs are acting *bona fide*, then leave should be granted for them to file the suit.

Each of the parties will bear its own costs in this Court.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Thumala Ayyalureddi .. *Appellant**

v.

Thumati Mallareddi and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 9, rule 9—Bar under—If applies to applications made in execution of a decree.

The bar applicable to suits under Order 9, rule 9, Civil Procedure Code, does not apply to applications made in execution of a decree. A decree-holder whose execution application has been dismissed for default is entitled with immunity to make any number of applications so long as they are in time.

It is a point for consideration by the rule committee whether it will be proper to add to the rules regarding execution, a provision analogous to the one contained in Order 9, rule 9, Civil Produre Code.

Appeal against the order of the District Court of Nellore, dated 17th October, 1945, in A. S. No. 159 of 1945 preferred against the order in E. A. No. 361 of 1944 in O. S. No. 379 of 1934, District Munsiff Court, Kavali.

K. Umamaheswaram for Appellant.

Ch. Raghava Rao and *Alladi Kuppuswami* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the fifth defendant from the order of the learned District Judge of Nellore dismissing his appeal against the order of the learned District Munsiff of Kavali in E. A. No. 361 of 1944 in O. S. No. 379 of 1934.

The plaintiff obtained a decree for partition and for future profits against defendants 1 to 5. On 10th April, 1942, the plaintiff gave up the relief granted under the decree for payment of mesne profits against the fifth defendant. There-

1. (1920) 30 M.L.T. 47.
2. A.I.R. 1935 Mad. 542.

* A.A.A.O. No. 94 of 1946. 10th November, 1947.

after the plaintiff attached some properties in E. P. No. 78 of 1940. Then the fifth defendant filed E. A. No. 644 of 1942 claiming that the properties belonged to him and not to the first defendant and were not liable to be sold. This petition was filed by him under section 47, Civil Procedure Code, which was dismissed for default on 12th May, 1943. It was restored on 17th August, 1943, in E. A. No. 520 of 1943, and the original petition was again dismissed for default on 13th November, 1943. The property was thereafter sold on 7th February, 1944. The fifth defendant filed E. A. No. 361 of 1944 on 20th of March, 1944, under section 47 and Order 21, rule 90, Civil Procedure Code. The petition was dismissed by the learned District Munsiff, and on appeal his decision was confirmed by the learned District Judge.

The Courts below have held that so far as the allegations in the petition are within Order 21, rule 90, Civil Procedure Code, the petition is out of time and that there is no substance in the grounds on which the sale is sought to be impeached. This point is not pressed in this Court. The only ground urged in this appeal is that the view of the Courts below that the petitioner is barred by *res judicata* from raising the contention that the property sold belonged to him by reason of the orders in E. A. No. 644 of 1942 is wrong. This contention of the learned advocate for the appellant is well founded as the order in E. A. No. 644 of 1942 was only an order dismissing the petition for default and not on merits. As pointed out in the decision in *Lachiram Santhokchand Ammechand Firm* v. *Tharachand Jayarupji Firm*[1], the bar applicable to suits under Order 9, rule 9, Civil Procedure Code, does not apply to applications made in execution of a decree. Recently the High Court under its rule-making power under section 122, Civil Procedure Code, made certain amendments to Orders 9, 21 and 43 of the First Schedule to the Code of Civil Procedure whereby rule 15 of Order 9 was omitted and two rules 104 and 105 were added after rule 103 of Order 21. The effect of these amendments is that if an application in execution is dismissed or an order *ex parte* is passed against the respondent in an execution application, liberty is given to the party against whom the order is made to have it set aside on the analogy of Order 9, rule 9 and Order 9, rule 13, Civil Procedure Code. The provisions of section 5 of the Limitation Act are also made applicable to such applications; but the bar contained in Order 9, rule 9 preventing a plaintiff whose suit has been dismissed for default from instituting a fresh suit in respect of the same cause of action is not made part of these rules.

The result is, a decree-holder whose execution application has been dismissed for default is entitled with immunity to make any number of applications so long as they are in time. It is a point for consideration by the Rule Committee whether it will be proper to add to these rules a provision analogous to the one contained in Order 9, rule 9, Civil Procedure Code. I am not deciding the question whether these rules have retrospective operation as in either event I see no bar for entertaining an application of the nature filed by the appellant under section 47, even though the earlier application E. A. No. 644 of 1942 was dismissed twice.

The result is, the appeal is allowed and the orders of the Court below in so far as they dismissed the application under section 47 without deciding the question whether the property really belonged to the fifth defendant or belonged to the first defendant are set aside. The petition is remanded to the District Munsiff's Court, Kavali, for disposal on the evidence on record. The petition is specifically confined to the question under section 47, Civil Procedure Code. As the appellant has failed in his contention relating to the allegations falling under Order 21, rule 90, he is not entitled to costs in this Court. Leave refused.

V.S. *Appeal allowed.*

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1. (1936) 71 M.L.J. 490.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Ellappa Naicken .. *Petitioner**

v.

K. Lakshmana Naicken (dead) and others .. *Respondents.*

Criminal Procedure Code (V of 1898), *sections* 145 *and* 146—*Disputed properties in possession of receiver —Civil suit by one of the parties—Dismissal for default—Effect—Other side, if automatically entitled to possession.*

Proceedings commenced under section 145 of the Criminal Procedure Code, ended in the Magistrate passing an order that the properties in dispute should be in the possession of a receiver as he was unable to decide who was then in possession. One of the parties, then filed a suit in the Civil Court for a declaration of title and possession, which was dismissed for default and such dismissal was confirmed by the appellate Court, with the result that, that party became precluded and debarred from bringing a fresh suit on the same cause of action for the same relief. On an application to the Magistrate by the defendant in that suit that he may be put in possession of the properties on the ground that on the dismissal of the declaratory suit as between the parties the title had been determined by the principle of *res judicata,*

Held, though the dismissal of the suit may prevent the plaintiff from bringing a suit on the same cause of action, his rights to the properties, if any, had not been extinguished under section 28 of the Limitation Act, and it is not as if the parties have no further remedy, resulting in the property remaining in *custodia legis* for all time. Either of the parties is at liberty to bring a suit for the recovery of the profits received by the receiver within the period of limitation and the Civil Court will then adjudicate as to who is entitled to the profits. In such a suit, the question of title to the property will have to be decided and finally adjudicated. It is only such a finding in the judgment on the issue of title that will have the force of *res judicata* for the purpose of section 146 of the Code and will operate as a determination of the right of the successful plaintiff to the land and profits.

Rajah of Venkatagiri v. *Isakapalli Subbiah,* (1902) I.L.R. 26 Mad. 410, referred to.

Petition under sections 435 and 439, Criminal Procedure Code, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Karur, dated 30th November, 1946, in M. C. No. 70 of 1941.

V. V. Raghavan for Petitioner.

T. A. Anantha Aiyar for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to revise the order of the Sub-Divisional Magistrate of Karur dated the 30th November, 1946, by which he refused to direct the handing over of the immoveable property in dispute between the parties, on the ground that the petitioner before him was not entitled to the possession of the properties because he has not got an order from a competent Court determining his rights or that he was entitled to possession thereof. Proceedings under section 145 of the Code of Criminal Procedure had been initiated and were pending between the parties in 1941 and finally on the 20th February, 1942, the Joint Magistrate, Karur, passed an order under section 146 of the Code of Criminal Procedure directing that the village munsiff of Alamanattupatti be appointed receiver for the purpose of holding possession of the disputed properties as that Court was unable to satisfy itself as to which of the parties was then in possession. Accordingly the village munsiff entered possession and has been collecting the rents and profits thereof.

The respondents to this application filed O. S. No. 141 of 1943 on the file of the District Munsiff's Court, Karur, for a declaration of title and possession of the suit properties praying that the Court may be pleased to declare that he is entitled to possession of the properties and to receive rents and profits. The petitioner was sole defendant in the suit. On the 7th December, 1944, this suit was dismissed for default. An application to set aside this order of dismissal under Order 9, rule 9, Civil Procedure Code, was also dismissed by the District Munsiff on 20th July, 1945. An appeal against this order shared the same fate at the hands of the District Judge

* Cr.R.C. No. 211 of 1947. 20th February, 1948.
(Cr.R.P. No. 201 of 1947).

of Trichinopoly on the 15th January, 1946, with the result that the plaintiff's suit for declaration and possession now stands dismissed.

The effect of this dismissal under Order 9, rule 9, Civil Procedure Code, is that the plaintiff is precluded and debarred from bringing a fresh suit on the same cause of action for the same relief.

The petitioner who was defendant applied to the Sub-Divisional Magistrate, Karur, for possession of the properties after the suit was dismissed on the ground that the order of the District Munsiff has determined the petitioner's rights. The Sub-Divisional Magistrate passed the order dated the 16th October, 1945, which was practically reinforced by the order dated 30th November, 1946, stating that there has been no declaration by a Civil Court as to who is entitled to the suit properties and therefore the land will continue to be in the possession of the receiver. Now, this application is by the defendant in O. S. No. 141 of 1943 seeking to revise the order of the Sub-Divisional Magistrate as already stated.

Mr. Raghavan for the petitioner contends that once the District Munsiff dismissed the suit for default and which dismissal was confirmed by the District Judge, as between the parties to the suit the title has been determined by the principle of *res judicata*. The plaintiff cannot any longer bring a suit on the same cause of action, and that this tantamounts to a declaration of defendant's title. No doubt, under the provisions of the Code of Civil Procedure the dismissal of a suit under Order 9, rule 9 prevents the plaintiff from bringing a suit on the same cause of action, but his rights to the properties, if any, have not been extinguished under section 28 of the Limitation Act. For the purpose of the present case I do not wish to decide the vexed question as to whether the order of dismissal amounts to a determination by a competent Court of the rights of the parties or as to the person entitled to possession thereof, for the reason, that according to my reading of the decision in *Rajah of Venkatagiri* v. *Isakapalli Subbiah*[1], the parties herein have got a further remedy. The learned counsel for the petitioner contends that this Court in *Rajah of Venkatagiri* v. *Isakapalli Subbiah*[1] has decided that suits of the nature contemplated under section 146 of the Code of Criminal Procedure should be filed within six years of the date of the order under Article 120 of the Limitation Act. No doubt the learned Judges have held that either of parties to a decision under section 146 of the Code of Criminal Procedure has to file a suit within six years for a declaration of title and a suit brought thereafter will be dismissed *in limine* on the ground that it is barred by limitation. But even so the learned Judges have held that either party is entitled to bring a suit for the recovery of the profits of the land for the reason that the profits received by the Magistrate within six years before the date of suit will not be barred as the right to sue will accrue only from time to time as the profits were received. In such a suit for the recovery of profits the question as to who is entitled the same will have to be decided with the result that the question of title will also be finally adjudicated. Such a finding in the judgment on the issue of title will have the force of *res judicata* for the purpose of section 146 of the Criminal Procedure Code and it would practically operate as a determination of the right of the successful plaintiff to the land under attachment as well as the amount in deposit. That being so, it is not as if the parties here have no further remedy resulting in the property remaining in the *custodia legis* for all time. Either of the parties is at liberty to bring a suit for the recovery of profits received by the receiver within a period of limitation and the Civil Court will then adjudicate as to who is entitled to the profits of the land. The adjudication of the rights to the profits will finally determine the title to the property also and thereafter the Criminal Court will be bound to recognise this determination of the right of the successful plaintiff and hand over the property to whomsoever has succeeded in the civil suit. Therefore there is no reason for interference with the order of the learned Sub-Divisional Magistrate and this petition is dismissed.

V.P.S. ——— *Petition dismissed.*

1. (1902) I.L.R. 26 Mad. 410.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE TYAGARAJAN.

Syedamian Sahib .. *Appellant**

v.

Janaki Ammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 48—Application for appointment of receiver in execution—Receiver appointed—Obstruction to delivery—Execution petition dismissed—Subsequent application to continue execution petition—Competency—Bar of limitation.

The decree holder who had obtained a decree in 1929 and whose prior execution petition had been dismissed, filed in 1940 an execution petition for the appointment of a receiver to take possession of the property and deposit the income thereof into Court. The judgment-debtors who were served with notice of the application reported through their pleader that they had no objection to the prayer asked for in the execution petition. The decree-holder paid batta for delivery of the properties to the receiver, but the properties were not delivered as a third party was obstructing delivery. The application for removal of obstruction was rejected on the ground that the decree-holder, was only entitled to the income of an undivided moiety and was not entitled to apply for the appointment of a receiver. Consequent on this the execution petition itself was "dismissed" by order dated 6th March, 1941. An appeal against the order on the petition for removal of obstruction was also eventually dismissed. On 24th June, 1943, the decree-holder filed an execution application for the revival and continuance of the prior execution petition of 1940 by granting the relief for the appointment of a receiver. On a contention that the application was incompetent and barred under the provisions of section 48, Civil Procedure Code.

Held, that the order dismissing the previous execution petition did not finally dispose of the execution petition and it must be considered to be pending and that the later application could be properly considered to be a mere continuation or revival of the previous application.

Appeal against the order of the Subordinate Judge's Court of Dindigul, in A.S. No. 42 of 1944, dated 1st October, 1945 (E.A. No. 132 of 1943 in E.P. No. 227 of 1940, District Munsiff Court, Palni, in O.S. No. 1417 of 1928, District Munsiff Court, Udumalpet).

V. Seshadri and *K. S. Ramamurthi* for Appellant.

R. M. Halasyam for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises in execution proceedings and is from an order of the learned Subordinate Judge of Dindigul confirming the dismissal of an execution application by the learned District Munsiff of Palni. The facts leading up to this appeal are the following.

The decree-holder who is the appellant before this Court obtained a decree in O. S. No. 1417 of 1928 on the file of the District Munsiff's Court, Udumalpet, for about Rs. 2,500 on the 30th July, 1929, against one Ayyathurai Mudaliar. The judgment-debtor died subsequent to this decree and an execution application E. P. No. 404 of 1931 was filed on the 16th July, 1931, for attachment and sale of an item of property, R. S. No. 1194/2 and two other items. No question arises in this appeal as regards the two other items and the only question is with reference to the relief prayed for in respect of item R. S. No. 1194/2. Attachment of the property was ordered and a claim was filed by two persons, namely, Sornammal and her husband one Muthusami Mudaliar, both of whom had been impleaded as the third and fourth defendants in the suit. Their claim was on the footing that the property was not liable to be proceeded against in execution as the property of Ayyathurai and they were entitled to an interest in the property in their own right. The property originally belonged to one Sethurama Mudaliar who by a deed dated 30th September, 1883, Ex. P-1, gifted the northern portion of the property paimash 315 of the extent of $17\frac{1}{2}$ kulis to Meenakshiammal, one of his sisters. By another deed, Ex. P.-2 dated the 1st October, 1883, he gifted the southern portion of the property of the total extent of $20\frac{1}{2}$ kulis to another sister Thangathammal. Meenakshiammal died in 1919 and on the 3rd August,

*A.A.A.O. No. 64 of 1946. 19th September, 1947.

1928, her sons Muthusami and Ayyathurai, and Thangathammal, the donee under Ex. P-2 executed a deed of settlement Ex. P-3. According to the construction placed upon this deed by the High Court in proceedings instituted, the result of this settlement was that the income of the property became available for payment to the creditors of Ayyathurai, the judgment-debtor, and a charge was properly created under the terms of the document on the income. It was also held that notwithstanding the death of Ayyathurai, the charge subsisted so long as the debt remained unsatisfied. Rukmani however was not a party to this document Ex. P-3 so that *prima facie* as against her interest in the property no charge would be created in respect of the income. The claimants contended on the construction of the document Ex. P-3 that on the death of Ayyathurai there was no attachable interest at all belonging to the judgment-debtor. This contention was upheld by the learned District Munsiff who held that the death put an end to the rights of the creditors but at the same time allowed the claim only in so far as the interest of the claimants were concerned as Rukmani was not a party to the proceeding. An appeal was taken therefrom and the learned Subordinate Judge confirmed the order of the learned District Munsiff. In a further appeal, the High Court held that the income stood charged for payment of the debts notwithstanding the death of Ayyathurai. However, before the learned Judge who dealt with the matter in C. M. S. A. No. 81 of 1934, the contention put forward on behalf of the appellant-decree-holder was apparently stated to be the right to attach an undivided moiety and on that footing the learned Judge in his judgment stated that the income of the undivided moiety would be available for the creditor. But clause 2 of the decretal order passed on the footing of the judgment stated as follows :

" That the appellant herein (plaintiff) be at liberty to proceed in execution against the income of the said item No. 1 and not against the corpus."

The execution application No. 404 of 1931 was dismissed. Subsequently the decree-holder filed E. P. No. 227 of 1940 for the appointment of a receiver to take possession of the southern portion of item No. (the land called Nadu Kanna land 9 acres 40 cents) and the prayer in the application was as follows :

" It is therefore prayed that the Court may be pleased to pass an order in consonance with the order of the High Court in A.A.A.O. No. 81 of 1934 directing the following, *viz.*

That the sum mentioned in this petition may be collected and paid by means of appointment of a receiver, *who may be authorised* (*a*) to take possession of the properties shown in the list filed along with this under section 51, Order 21, rule 11 and Order 40, rule 1, Civil Procedure Code, order in which the suit decree has a charge and if there are (Crops) standing thereon to sell them, and (*b*) to manage the suit properties for the benefit of the plaintiff till the suit decree is satisfied, by leasing them and collecting the lease amounts by maintaining the accounts relating to receipts and expenses and by furnishing the accounts to Court and depositing the sums in Court then and there."

Notice of this application was served on defendants 2 to 4 and on their behalf their learned advocate would appear to have made the endorsement dated the 17th July, 1940, that he had no objection to the prayer asked for in the execution application. One Mr. S. Krishnamurthi Iyer, a member of the Bar, was appointed receiver in the first instance and as he prayed that he might be relieved from the receivership, one Mr. Arunachala Goundar, a member of the Bar, was appointed receiver on the 6th August, 1940. The receiver furnished security as required by the Court and filed a security bond which was accepted on the 21st August, 1940. The decree-holder paid batta for delivery of the properties mentioned in the execution application to the receiver. The properties were not delivered to the receiver as one Lakshmanan Chettiar obstructed delivery. On the 29th August, 1940, an application, E. A. No. 300 of 1940, was filed for removal of obstruction and that application and the execution petition came on for hearing together on various dates. On the 5th March, 1941, the application for removal of obstruction was heard and it was dismissed. The dismissal would appear to be on the ground that according to the judgment passed in C. M. S. A. No. 81 of 1934 by the High Court the decree-holder was only entitled to ask for the income of an undivided moiety being realised and that in consequence the application for a receiver to take physical possession of the property and realise the rents and profits therefrom

was incompetent. Following the dismissal of E. A. No. 300 of 1940, the E. P. No. 227 of 1940 was " dismissed " by order dated the 6th March, 1941. An appeal from the order refusing to remove the obstruction was taken to the learned Subordinate Judge of Dindigul who dismissed the appeal and a further appeal to the High Court would appear to have been thrown out even at the statge of admission.

On the 24th June, 1943, the decree-holder filed the execution application from which the present proceedings have arisen, E. A. No. 132 of 1943. The petition was for the revival and continuance of E. P. No. 227 of 1940 by granting the relief of the appointment of a receiver and asked for in it for the purpose and with the powers stated in the said affidavit. In paragraph 13 of the affidavit in support of the application, the decree-holder stated as follows :

" The charge on the income has been recognized by the High Court and it has to be enforced for the satisfaction of the said decree. Now that a receiver cannot take up possession of any definite extent or claim joint possession of 9 acres 40 cents of the undivided half share, the income alone of the property has to be reached for the satisfaction of my decree. A receiver has to be appointed at least for the purpose of calling upon the said Lakshmanan Chettiar to pay up the half share of the produce in respect of the entire land (exclusive of the extent released to Nataraja Othuvar), in his possession and take necessary proceedings against him and file a suit, if necessary, for the purpose of realising the income either of the undivided half of S. No. 1194/2 or of the specific plot of 9 acres 40 cents charged with the payment of the said decree should the said Lakshmanan Chettiar decline to pay the said income."

The learned District Munsiff held that this application was incompetent and barred under the provisions of section 48 of the Civil Procedure Code, and that the previous application E. P. No. 227 of 1940 could not be considered as pending or in any sense capable of being revived. He further observed that steps should have been taken to amend the order of the High Court in C. M. S. A. No. 81 of 1944 to make it read that the decree-holder was entitled to a charge not over the income of an undivided half share in S. No. 1194/2 but over the income of a specific portion of the survey field, *viz.*, an extent of 13 acres 40 cents lying to the south of the *Wari Vaikkal* mentioned in Ex. P-2 . Actually the property which passed under Ex. P-2, was the southern half which equated with reference to the total area was obviously roughly put down as a half before the High Court. In the counter affidavit filed by Muthuswami Mudaliar in E. A. No. 132 of 1943, he stated in paragraph 2 as follows :

" The northern portion is owned and possessed by Rukmani Ammal, grandaughter of Meenakshi Ammal and by several others in separate portions. Of the southern block, 9 acres 40 cents were owned by the said Lakshmanan Chettiar who has since parted away with his interest to a stranger and the rest of the extent is owned by the said Nataraja Othuvar."

It is quite clear that the southern portion was the one over which title passed under Ex. P-2 in favour of the settlee and it is not surprising that defendants 2 to 4 themselves assented to the appointment of a receiver before the learned District Munsiff. In fact, save as against Rukmani the decreeholder would *prima facie* be entitled to realise the income from the entire property. It must be noted, and it has been so found, that the obstructor Lakshmanan Chettiar had no right whatsoever in the property as the purchase by him at a Court sale was *lis pendens* and so against him the decree-holder appellant is entitled to enforce all rights which he could as against his judgment-debtor Ayyathurai. The result of the decision of the High Court on the construction of Ex. P-3 was that the corpus was not available to the creditor. This by no means negatives the right of the decreeholder to secure the rents and profits either by asking for a receiver taking physical possession of the property and letting it out ; or collecting the rents and profits thereof from the tenants. The learned District Munsiff having disposed of E.A. No. 300 of 1940 purported to " dismiss " the execution petition also and this has been taken as a final decision come to on that execution petition, dismissing it on the merits and holding that the decree-holder was not entitled to the relief prayed for. The learned District Munsiff also held that the decreeholder must be deemed to have abandoned the particular relief now sought for by him and that therefore E. P. No. 227 of 1940 could not be revived. No case of abandonment has been argued before me and I fail to see

how any question of abandonment arises. The learned Subordinate Judge in appeal upheld the trial Court's order and dismissed the appeal.

Mr. Viswanatha Sastri appearing for the appellant contends that E.P. No. 227 of 1940 had not been finally disposed of and is capable of being revived. The prayer for the appointment of a receiver to take possession of the property specified was coupled with a prayer that he should also be enabled to manage the properties for the benefit of the plaintiff till the decree was satisfied by leasing them and collecting the lease amounts. A receiver was appointed and there is nothing on record to show that he was discharged. As I stated there was no reason why the receiver should not have been there and then authorised to take steps for obtaining possession of the property in independent proceedings or in any case to collect the rents and profits, or damages for use and occupation, from the person in possession who had no higher rights than the judgment-debtor. No reasons were given for the dismissal of E. P. No. 227 of 1940. In a case like this where I am satisfied that the decree-holder was entitled to the assistance of the executing Court to realise the rents and profits of the property forming the subject-matter of the application, the question arises "What is the construction to be placed on order in E. P. No. 227 of 1940?" Mr. Viswanatha Sastri has referred to certain authorities in support of his contention that the execution petition should in circumstances like this, be considered pending and be dealt with by the executing Court.

In *Sundaramma* v. *Abdul Khadar*[1], an execution application was dismissed for non-payment of batta, but in dealing with the question which arose for decision, there are certain observations which are relevant. At page 502 Sundaram Chetti, J., observed as follows :

> " The principle of law deducible from a long course of decisions seems to be that an application for execution which has been finally and properly dismissed cannot be revived."

At page 503 is to be found the following passage :

> " Where an execution petition can be deemed to have been not finally disposed of and can be treated as still pending in the eye of law, the subsequent execution application may be treated as one for the continuance of the former one. Where the former execution application was dismissed finally, but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one."

In passing I may observe that I am not prepared to say that there was any default or neglect on the part of the decreeholder in this case.

Mr. V. Ramaswami Iyer, appearing for the respondents contends that whether the order of dismissal made in E.P. No. 227 of 1940 was or was not justified, is not a matter which can be considered in this appeal. He argues that the only question is whether the execution petition was terminated finally. If it was, whatever maybe the reason, it ought to be considered as not capable of being revived by the present application. He also contended that the application now made for revival is for a different relief from the one asked for in the previous application and even on that footing the previous petition cannot ve revived. He referred me to the decision in *Suryanarayana Pandarathar* v. *Gurunada Pillai*[2], in which an execution application was dismissed, the applicant being relegated to a suit to establish his right. He did not file a suit but put in a fresh aplication for execution which was also dismissed. He thereafter filed a suit, obtained a decree in his favour and then filed an execution application praying for the revival of the previous application. It was held that the application was barred by limitation. This is clearly a case where an earlier execution application was dismised expressly referrring the applicant to a regular suit. Obviously reasons were given for the dismissal and I am of the view that this decision does not apply to the present case. I may refer to the recent decision in C.M.A. No. 115 of1946[3] to which I was a party sitting with the learned Chief Justice. In that case an application by a decree-holder was made for possession of two items of properties purchased by him. Obstruction was raised with reference to delivery

1. (1932) 64 M.L.J. 664 : I.L.R. 56 Mad. 490 (F.B.).
2. (1897) 8 M.L.J. 25 : 21 Mad. 257.
3. (1947) 2 M.L.J. Short notes, p. 35.

of one item of property and an application for the removal of obstruction was made. The application for removal of obstruction was dismissed as the obstructor claimed a right of residence during her lifetime. The decreeholder was directed to establish his right by a separate suit. Delivery of the other item was given and the application for delivery was "recorded." The Court held that it was the duty of the executing Court to direct such possession as could have been given to the decree-holder purchaser. Even though he was not entitled to actual possession he was entitled to symbolical possession and the application for delivery of possession was held pending and capable of being revived. In my view in the present case there was, and could be, no objection on the admitted facts for the receiver appointed to realise the rents and profits from the person in occupation or to take proceedings against him. As already observed, a receiver had been appointed and it does not appear he was discharged. This being so, it seems to me that the application which has now been filed, E.A. No. 132 of 1943 can properly be considered to be a mere continuation or a revival of the previous application. I hold the order of "dismissal" passed on the 6th March, 1941, did not finally dispose of the application and that the application must be considered pending. In the light of this, I reverse the judgments of the lower Courts and direct that the execution petition No. 227 of 1940 and the present application E. A. No. 132 of 1943 be taken on file and disposed of according to law by the appointment of a fresh receiver if necessary and by directing him to take appropriate proceedings for realisation of the rents and profits of the property. The appellant will have the costs of this appeal and of the proceedings in the lower Courts. (Leave to appeal is refused).

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

M. A. C. Arunachala Mudali and another .. *Appellants**.

v.

Rajagopala Chetty and another .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (5)—*Application in accordance with law—Requirements—Application* bona fide *asking for transmission of the decree under a mistake as to the jurisdiction of the Court in regard to the property sought to be proceeded against—Step-in-aid of execution.*

Where a decree-holder comes to Court with an application *bona fide* asking for a relief on facts alleged in the petition, which if the facts are proved he would be entitled to obtain, and the application is made to the proper Court having jurisdiction to grant the relief asked for, the fact that that Court came to a wrong decision on the facts would not make the application any the less an application not in accordance with law. It may be that the order of the Court is wrong as it ultimately turns out, but it does not mean that the step he has pursued is not a step in aid of execution, though it unfortunately turns out to be a wrong step in the end. All that the law requires is that there should be a step-in-aid of execution and is not concerned with the question whether that step ultimately turns out to be infructuous or a wrong step.

Where the decree-holders have throughout acted *bona fide* and made the execution applications asking for transmission of the decree under the mistaken impression that the property sought to be proceeded against was outside the jurisdiction of the Court which passed the decree and also the Court which passed the various transmission orders did so under the same mistaken belief, it cannot be said that the applications made by the decree-holders are not applications in accordance with law and the steps they look are not steps-in-aid of execution.

Santhappa v. *Siddalingayya Eswarappa Bulla*, (1939) 1 M.L.J. 827 followed.

Appeal against the order of the District Court of North Arcot, dated 7th January, 1946, and made in A.S. No. 222 of 1945 preferred against the order of the Court of the District Munsiff of Tiruppattur, dated 12th April, 1945, and made in E.P. No. 940 of 1944 in O.S. No. 337 of 1934.

A. Sundaram Aiyar for Appellants.

A. V. Viswanatha Sastri for Respondents.

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*A.A.A.O. No. 147 of 1946. 10th November, 1947.

The Court delivered the following

JUDGMENT.—The plaintiffs-decree-holders have preferred this appeal against the order of the District Judge of North Arcot at Vellore dismissing the execution petition filed by them on the ground that it was barred by limitation after setting aside the order of the learned District Munsiff of Tiruppattur allowing execution to proceed. The plaintiffs obtained a final decree in O.S. No. 337 of 1934 on the file of the Court of the District Munsiff of Tiruppattur on foot of a mortgage. The final decree is dated 30th November, 1937. The property comprised in the mortgage is situate in Kalliyur village in Gudiyattam Taluk. By reason of the reshuffling of the territorial jurisdiction of the Courts the plaintiffs thought that the property was within the jurisdiction of the District Munsiff's Court of Vellore, and filed on 4th January, 1938, the first execution application, No. 15 of 1938 which was ordered on 7th January, 1938, but nothing further was done in pursuance of the order. On 3rd January, 1941, the second execution application, E.A. No. 6 of 1941 was filed in the Tiruppattur Court and again an order for transmission was made on 11th January, 1941. As no further steps were taken in that Court the decree was presumably returned to the Court which passed the decree which necessitated a third application, E.A. No. 461 of 1942 filed on 21st March, 1942, for transmission of the decree to the Vellore Court. This was again ordered on 24th March, 1942, and this time after the order of transmission on 14th September, 1942, the decree-holders filed Execution Petition, No. 107 of 1942 for sale of the properties. The application was not pressed by the decree-holders as the judgment-debtors raised the contention that it was barred by limitation as the prior execution applications were not applications in accordance with law to take a step in aid of execution. On 9th November, 1944, the decree-holders filed a fresh execution petition, E.P. No. 940 of 1944 in the Tiruppattur Court for sale of the properties. The judgment-debtors repeated their objection that the execution was barred by limitation. This contention was ovreruled by the learned District Munsiff and he directed execution to proceed but on appeal however the learned District Judge set aside the order of the learned District Munsiff and dismissed the application as having been barred by limitation. The appellants complain against this order.

The question in this appeal therefore is whether the prior execution applications were applications in accordance with law to take a step-in-aid of execution of the decree within the meaning of Article 182, clause (5) of the Limitation Act. It is urged on behalf of the appellants that as in the execution applications a relief which the Tiruppattur Court could not have granted was claimed they were not applications in accordance with law and were not steps-in-aid of execution of the decree. It now turns out that the decree-holders-appellants were under a mistake in thinking that the property was situate within the jurisdiction of the Vellore Court while in fact the properties all along were within the territorial jurisdiction of the Tiruppattur Court. The Court also, in granting the applications, was under the mistaken impression that it had no jurisdiction to sell the properties and that the decree should be sent for execution to the Vellore Court. No doubt the order of transmission made by the Tiruppattur Court as it now turns out was a wrong order but the error arose by reason of the fact that it was mistakenly assumed that the properties did not exist within the jurisdiction of the Tiruppattur Court. The applications were made to a proper Court in which the decree-holders asked for a relief on facts which if true could have enabled them to execute the decree in the Vellore Court. As the basis of the orders of transmission was a mistake of fact and not a mistake of law I think this case falls within the principle of the decision of a Bench of this Court in *Santhappa* v. *Siddalingayya Eswarappa Bulla*[1]. In that case a decree-holder filed an execution petition before the Court which passed the decree asking it to transmit the decree for execution to the First Class Subordinate Judge's Court at Bellary. In fact no such Court was in existence at the time and the Court which passed the decree could not have made an order of transmission to that effect. Still the learned Judges

1. (1939) 1 M.L.J. 827.

held that the application was one in accordance with law and amounted to a step-in-aid of execution. The very decisions relied on for the respondents in *Sital Prasad Shukul* v. *Babu Lal Shukul*[1], and *Amrit Lal* v. *Muralidhar*[2], were considered by the Bench. It is stated in that judgment after referring to these decisions :

> "We do not think that any of these decisions has any bearing upon this case because in all of them the application was made for transfer to a Court actually in existence but without pecuniary jurisdiction to execute the decrees, a mistake of law which the petitioner could have avoided. This is not, we think, the same as applying for transmission to a Court which does not exist but which the petitioner wrongly believes to exist. This is a mistake of fact in our opinion."

To the same effect is the decision of a single judge of this Court in *Ayyanna Goundan* v. *Thandavan Chettiar*[3]. In that case, Somayya, J., has to consider a case in which the application was one to arrest the judgment-debtor who was adjudicated an insolvent and obtained an order of discharge and could not be arrested. Following the decision in *Ramachandra Naidu* v. *Tirupathi Naidu*[4] of Spencer and Krishnan, JJ., the learned Judges held that notwithstanding that the application asked for a relief which was no longer available against the defendant it was still an application in accordance with law. The Patna High Court has also taken a similar view in *Bhisundeo* v. *Raghunath Prasad*[5].

In view of these decisions, I think that where a decree-holder comes to Court with an application *bona fide* asking for a relief on facts alleged in the petition, which if the facts are proved he would be entitled to obtain, and the application is made to the proper Court having jurisdiction to grant the relief asked for, the fact that that Court came to a wrong decision on the facts would not make the application any the less an application not in accordance with law. It may be that the order of the Court is wrong as it ultimately turns out but that does not mean that the step he has pursued is not a step-in-aid of execution though unfortunately it turns out to be a wrong step in the end. All that the law requires is that there should be a step-in-aid of execution and is not concerned with the question whether that step ultimately turns out to be an infructuous or a wrong step. The appellants in the present case have throughout acted *bona fide* in thinking that the property in fact existed within the territorial jurisdiction of the Vellore Court. Not only they but also the Court at Tiruppattur which passed the various transmission orders was also under the same belief. In these circumstances it is difficult to see why the applications made by the decree-holders are not applications in accordance with law and the steps they took are not steps-in-aid of execution. The only ground on which the learned District Judge differed from the learned District Munsiff was that, according to him, though the principle in *Santhappa* v. *Siddalingappa Eswarappa Bulla*[6] would have applied to the facts of the case if the mistake is one of fact and not of law it would not apply to the present case as the mistake was one of law and not of fact. In this, in my opinion he is clearly wrong.

The result is this appeal is allowed ; the order of the learned District Judge is set aside and that of the District Munsiff is restored with costs here and in the Courts below. The learned District Munsiff will take the execution petition into consideration and dispose of the other questions, if any, raised by the judgment-debtors.

Leave refused.

V.S. *Appeal allowed.*

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1. (1932) I.L.R. 11 Pat. 785.
2. (1922) I.L.R. 1 Pat. 651.
3. (1945) 1 M.L.J. 355.
4. (1916) 35 I.C. 614.
5. A.I.R. 1940 Pat. 677.
6. (1939) 1 M.L.J. 827.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Bandaru Rattayya and others .. *Appellants**

v.

Gaddam Chandrayya and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 53-*A—Joint family—Father and managing member signing unregistered sale-deed—Transaction impugned by sons—Vendees in possession under the sale—Cannot rely on doctrine of part-performance.*

Section 53-A of the Transfer of Property Act requires that the contract relied on must be signed by the person claiming to recover possession, or on his behalf presumably by some one. So, where an unregistered sale-deed was signed only by the father of a joint Hindu family who was also the manager and the vendees are in possession of the property, in a suit by the sons after the death of the father, impugning the transaction, the vendees cannot rely upon the doctrine of part-performance. To accept the contention that the father and head and manager of the family must be deemed to have entered into the contract on behalf of and for the benefit of the joint family of himself and his sons and that therefore the contract also must be deemed to have been signed by him not only for himself, but also on behalf of the sons would be introducing into the language of the section ignoring its express words, terms which are not there. The statute requires the actual signature of somebody who is the plaintiff or by some one on his behalf.

Subramanyam v. *Subba Rao,* (1944) 1 M.L.J. 147 : I.L.R. 1944 Mad. 749 and *Bhupal Chandra Sarkar* v. *Jagad Bhushan Sarkar,* I.L.R. 1943 (1) Cal. 56, referred to.

Appeal against the order of the Court of the Subordinate Judge, Masulipatam, dated 13th July, 1946, in A. S. No. 1945 of 1945, preferred against the decree of the Court of the District Munsiff, Bezwada in .O. S. No. 542 of 1942.

K. Kameswara Rao for Appellants.

V. Rangachari for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against an order of remand passed by the learned Subordinate Judge of Masulipatam reversing the decree of the District Munsiff of Bezwada. The plaintiffs are the appellants before me. They are the sons of one Rajayya. On the 15th of June, 1935, Rajayya agreed to sell land of the extent of 11 acres 81 cents to the first defendant for a sum of Rs. 12. Ex. D-1, is an unregistered sale-deed executed on the same day. In pursuance of that document the first defendant is in possession of the property. Defendants 2 to 5 are the sons of the first defendant. Rajayya died some time ago and the suit out of which this appeal arises was instituted by the plaintiffs for a declaration of their title to the plaint schedule property and for recovery of possession on the footing that the property was the joint family property of themselves and their father and that the father had no power to sell the property ; that the first defendant, taking advantage of the old age of the father, unlawfully got into possession of the property and brought into existence the sale deed. The defendants claim that this property was the self-acquired property of the plaintiffs' father and that the sons had no right in it ; that the sale was real and that though there was no registered document in their favour they were at any rate entitled to rely upon an oral sale followed by delivery of possession as the consideration for the sale was below Rs. 100. They also invoked the doctrine of part-performance under section 53-A of the Transfer of Property Act to resist the suit for possession. The trial Court found that the property was the joint family property of Rajayya and his sons, that first defendant had acquired no legal title to the property in the absence of a registered instrument and that defendants were not entitled to invoke the doctrine of part-performance as embodied in section 53-A of the Transfer of Property Act against the plaintiffs who were not parties to the contract. The suit was accordingly decreed by the trial Court. On appeal to the learned Subordinate Judge, he agreed with the findings of the District Munsiff regarding the nature of the property and also found that the defendants had no legal title. He however took the view that the defendants were entitled to resist the suit under section 53-A of the Transfer

*A.A.O. No. 356 of 1946. 19th December, 1947.

of Property Act as Rajayya must be deemed to have executed a contract as manager of the family and the plaintiffs must be deemed to be claiming through him. As there was no finding by the District Munsiff on the question whether the sale was binding on the plaintiffs he remanded the suit for a disposal after determining that question.

In this appeal by the plaintiffs, the only question that arises for consideration is whether the view of the learned Subordinate Judge that section 53-A applies to the present case is correct. Ex. D. 1 is signed by Rajayya, the father, and it does not bear any other signature on the face of it. Section 53-A of the Transfer of Property Act requires that the contract relied on must be signed by the person claiming to recover possession, or on his behalf presumably by some one. On the face of it the contract under Ex. D. 1 is personal to Rajayya and therefore as against the plaintiffs, the first defendant who was put in possession of the property in pursuance of the contract contained in Ex. D. 1 is not entitled to rely on that contract as the plaintiffs are not parties to it. Nor was it signed on their behalf by anybody. In a case where a guardian executed a contract on behalf of a minor and put the vendee in possession of the property, and the minor thereafter attempted to recover possession by a suit, it was held by a Bench of this Court, in *Subramanyam* v. *Subba Rao*[1], that the minor plaintiff on whose behalf the contract was executed by the guardian was not the contracting party and was not the transferor and that therefore section 53-A of the Transfer of Property Act was not applicable. It was pointed out in that case that the bar imposed by the statute is personal to the contracting party. The policy behind the section as pointed out by Patanjali Sastri, J., at page 756 in that decision is as follows :

> " The doctrine of part-performance rests on the ground of fraud which is personal and has been held to apply only to the party who, having entered into the contract and permitted the obligee to act on the faith of it as if it were legally perfect, seeks to resile from it on the ground of its imperfect execution."

On this reasoning it would be seen that the disability of the contracting party cannot be extended to other persons who have not signed the agreement or on whose behalf somebody had not signed the agreement. To the similar effect is the decision of the Calcutta High Court in *Bupal Chandra Sarkar* v. *Jagad Bhushan Sarkar*[2]. There the contract was by the widow and the purchaser was put in possession of the property. The widow died and the reversioner sued to recover possession of the property as there was no sale deed executed by the widow in favour of the purchaser. As the reversioner did not claim through the widow it was held that the purchaser who came into possession in pursuance of the contract by the widow was not entitled to resist the suit in ejectment. It was contended however on behalf of the respondent that as Rajayya was the father and the head of the family he was the manager of the family and must be deemeed to have entered into the contract on behalf of and for the benefit of the joint family of himself and his sons and that therefore the contract also must be deemed to have been signed by him not only for himself but also on behalf of his sons. In support of this contention cases have been cited by the learned advocate for the respondent in which it has been held in particular cases that a person who has signed a document without describing himself as manager was deemed to have signed on behalf of the family as manager. Nobody doubts this proposition. The language of section 53-A is not that the contract should be signed " by him or must be deemed to have been signed on his behalf. " The language is " signed by him or on his behalf." The statute therefore requires the actual signature of somebody who is the plaintiff or by some one on his behalf. If it is merely a question of inferring that the signature was on behalf of others also the section, in my opinion, would have no application and the language should have been " signed by him or on his behalf or deemed to have been signed on his behalf." To accept the contention of the learned advocate for the respondent would be introducing into the language of the section ignoring the express words, terms which are not there. I am therefore unable to accept the interpretation sought to be

1. (1944) 1 M.L.J. 147 : I.L.R. 1944 Mad. 749. 1. I.L.R. (1943) 1 Cal. 56.

placed by the learned advocate for the respondent on section 53-A of the Transfer of Property Act. In these circumstances, I am of opinion that the learned Subordinate Judge was not justified in applying the doctrine of part-performance contained in section 53-A to the present case. The order of remand passed by him was not justified and is hereby set aside and the decree of the learned District Munsiff is restored with costs here and in the court below. (Leave to appeal is refused).

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

Sanka Punnaiya .. *Petitioner**

v.

Battu Bhadraiya .. *Respondent.*

Partnership Act (IX of 1932), *section* 69 (2) *and* (3)—*Unregistered Firm—Dissolution—One partner becoming entitled to sue for a debt due by a third party to the partnership—Suit by that partner to recover that debt—Maintainability.*

One of the partners of a dissolved unregistered partnership, who by an arrangement with the other partner has become solely entitled to a debt due from a third party to the partnership, can sue to recover the debt, and it cannot be contended that such a suit is not maintainable by reason of section 69 (2) of the Partnership Act.

Shunmuga Mudaliar v. *Rathina Mudaliar,* (1947) 2 M.L.J. 241 followed.

Ponnappa Chettiar v. *Bodappa Chettiar,* (1944) 2 M.L.J. 406 not followed.

Petition under section 25 of Act XI of 1887 praying that the High Court will be pleased to revise the decree of the Court of District Munsiff, Tenali, in S.C. S. No. 29 of 1946 dated 5th July, 1946.

G. Chandrasekhara Sastri for Petitioner.

B. Bhadraiya for Respondent.

The Court delivered the following

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act to revise the judgment in Small Cause Suit No. 29 of 1946 in the Court of the District Munsiff of Tenali. The applicant filed the suit claiming a sum of Rs. 294-8-0 due on account of dealings with the respondent. In his plaint the applicant stated that the transactions had been between the defendant and a firm in which he, the applicant, was a former partner. He pleaded that that firm was dissolved in April, 1943 and that subsequently he became solely entitled to collect the outstandings of the firm on a decree of compromise arrived at in proceedings between himself and his former partner. The District Munsiff stated in his judgment that the decision of this case depended on whether or not it was found that the suit was maintainable under section 69 of the Partnership Act. He referred to clause (2) of that section which lays down that,

" No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered etc. etc."

He referred also to the fact that reliance had been placed for the applicant on clause (3) of the section which exempts suits instituted to realise the property of a dissolved firm but held that that clause would not assist the applicant in view of the decision of this Court in *A. T. Ponnappa Chettiar* v. *Bodappa Chettiar*[1]. The judgment of the District Munsiff was delivered on the 5th July, 1946, and at that date the decision relied on had not been questioned in this Court. In July, 1947, however, that decision was disapproved by a Bench of this Court (Gentle, C.J. and Govindarajachari, J.) in *Shanmugha Mudaliar* v. *Rathina Mudaliar*[2]. It was

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*C.R.P. No. 1246 of 1946. 27th January. 1948,

1. (1944) 2 M.L.J. 406. 2. (1947) 2 M.L.J. 241.

there held that the words of sub-clause (3) of section 69 are very wide and remove any disability which existed during the continuance of the partnership, that accordingly one of the partners of a dissolved unregistered partnership who by an arrangement with the other partner had become entitled to a debt due from a third party to the partnership can sue to recover that debt and that it cannot be contended that such a suit is not maintainable by reason of section 69 (2) of the Act.

Accordingly the case will be remanded to the trial Court for disposal in the light of this judgment. The respondent who has not appeared at the hearing of this application will pay the applicant's costs.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Munuswami Chetti and another .. *Petitioners**

v.

Muniswami Chetti and others .. *Respondents.*

Criminal Procedure Code (V of 1898) *sections* 435 *and* 439—*Revision against acquittal at the instance of a private party—Technical offence—Ordering re-hearing—Not justified—Easements Act (V of* 1882), *sections* 36 *and* 24— *Abating nuisance with a* bona fide *intention—If permitted.*

The High Court in a revision against an acquittal at the instance of a private party would not order a re-hearing of the case especially where the offence is a technical and insignificant one and the parties are very near relations.

It cannot be said that a person can abate a nuisance with a *bona fide* intention. Section 36 of the Easements Act clearly enacts that notwithstanding section 24 of that Act, a dominant owner cannot himself abate a wrongful obstruction of an easement.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional 1st Class Magistrate, Chingleput, dated 12th May, 1947 in C.A. No. 1 of 1947.

T. Rangaswami Iyengar for Petitioners.

T. E. Ramabhadrachariar for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The lower appellate Court is not justified in thinking that a person can abate a nuisance with a *bona fide* intention. Section 36 of the Easements Act clearly enacts that notwithstanding section 24 of that statute a dominant owner cannot himself abate a wrongful obstruction of an easement. Though Sadasiva Aiyar, J., in *Re Dharmalinga Mudaliar*[1], was of the view that where a wall built by a complainant on a public road was pulled down by the accused in the *bona fide* exercise of their right of way, the accused were not guilty of mischief or criminal trespass, a later Bench decision of this Court reported in *Narasimhalu* v. *Nagur Sahib*[2] following *Emperor* v. *Zipru*[3] and other decisions lays down the contrary view in view of the express provision of section 36 of the Easements Act. In this case the finding of the lower Court is that the land where the wall was built belonged to the complainant, but that the accused had been exercising a right of way when the wall was demolished by them. Therefore the reason given by the lower appellate Court for setting aside the conviction cannot stand.

But sitting as a Court of revision in a revision against an acquittal at the instance of a private party I feel I shall not be justified in ordering a re-hearing of the

*Crl.R.C. No. 897 of 1947. 13th February, 1948.
(Crl.R.P. No. 786 of 1947).

1. (1914) I.L.R. 39 Mad. 57.
2. (1933) 66 M.L.J. 31 : I.L.R. 57 Mad. 351.
3. (1927) I.L.R. 51 Bom. 487.

appeal especially since the offence is a technical one and the parties are very near relations. The fine imposed by the trial Court was only Rupees ten (Rs. 10) and it is not necessary in view of the trivial nature of the fine and the insignificance of the offence that a re-hearing of the appeal should be ordered.

This revision is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Thikka Surya Rao and others .. *Petitioners**

v.

Sirangu Sathiraju and Another .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 145 (6), 350, 366 and 367—Order under section 145 (6), if a judgment—Applicability of the provisions of sections 366 and 367 to such an order—Order written and signed by a Magistrate but pronounced by his successor—Legality.

A proceeding under section 145 of the Code is not a trial; the order issued by the Magistrate under sub-clause (6) of section 145 is not a judgment and therefore the provisions of sections 366 and 367 of the Code are not applicable and if at all, the provisions of section 350 alone are applicable. Hence, the action of a succeeding Magistrate in pronouncing in Court the order of his predecessor under section 145 (6) which had been written and signed by him when he was in office is perfectly justified and is not open to revision.

Case-law discussed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Amalapuram, dated 6th January, 1947 and made in M.C. No. 11 of 1946.

V. T. Rangaswami Aiyangar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

V. Viyyanna for Respondents.

The Court made the following

ORDER.—In proceedings under section 145, Criminal Procedure Code in M.C. No. 11 of 1946 on the file of the Sub-Divisional Magistrate, Amalapuram, it was declared under section 145, clause (4) and (6) that P.W. 5 was having possession of the disputed land through his agent P.W. 1 ever since delivery was given to him on 7th October, 1945 and that he had been having such possession, of the land on 15th May, 1946 when the preliminary order was passed.

The petitioners in this Court were respondents 1 to 3 in the lower Court and on their behalf Mr. V. T. Rangaswami Ayyangar raises a question regarding the validity of the order of the lower Court on the ground that the Magistrate who pronounced the order in Court, on the 6th January, 1947 did not conduct the inquiry or pass orders but had only pronounced an order written and signed by his predecessor on the 4th January, 1947. It was Mr. K. Kondal Rao, Sub-Divisional Magistrate, who heard the evidence and passed orders without pronouncing the same before he was relieved of that office and succeeded by Syed Mahaboob Sahib Bahadur who pronounced the orders written and signed by his predecessor. On this ground it is objected that there was no proper disposal of M.C. No. 11 of 1946 and that the order sought to be revised was void and without jurisdiction and therefore inoperative.

It is urged that the final order of the lower Court is a 'judgment' within the meaning of the word in sections 366 and 367, Criminal Procedure Code and therefore on the authority of certain decisions, I am asked to hold that a succeeding

*Crl.R.C. No. 340 of 1947. 4th March, 1948.
(Crl.R.P. No. 326 of of 1947.)

Magistrate has no jurisdiction to pronounce the judgment written and signed by his predecessor while the latter was not functioning as a Magistrate. There is no provision in the Criminal Procedure Code akin to Order XX, rule 2, Civil Procedure Code, which lays down that a judge may pronounce a judgment written but not pronounced by his predecessor. In Halsbury's Laws of England (Hailsham), Vol. IX, paragraphs 260 to 264, there is a discussion regarding the meaning and purport of the word 'Judgment' in criminal procedings and the conclusion stated there is that by the word 'Judgment' is meant a final order in a trial terminating in the conviction or acquittal of the accused. In section 2, clause (9), Civil Procedure Code, judgment is defined as a "Statement given by the Judge of the grounds of a decree or order". As there is no definition of the word 'Judgment' in the Criminal Procedure Code at all it will be proper to adopt the explanation of the word as understood in the English Courts referred to in Halsbury's Laws of England. In *Emperor* v. *Maheswara Kondaya*[1], it is laid down that though the word 'Judgment' is not defined in the Criminal Procedure Code, it is sufficiently clear from sections 366 and 367, Criminal Procedure Code, that it is intended to indicate the final order in a *trial* terminating in either the conviction or the acquittal of the accused. In a very recent decision in *Kuppuswami Rao* v. *The King*[2], Kania, C.J., delivering the Judgment of the Federal Court of India has accepted the interpretation of the word 'Judgment' to be the same as given by this Court in *Emperor* v. *Maheswara Kondaya*[1] and approved of by Sulaiman, J., in *Hori Ram Singh's case*[3].

In the light of these authorities, the question has to be considered as to whether the order of the Sub-Divisional Magistrate declaring one of the parties to be in possession within two months of the preliminary order is a Judgment. Sections 366 and 367 do not in terms apply to proceedings under section 145, Criminal Procedure Code. It is well settled that proceedings under the latter section cannot be a 'trial' wherein the provisions laid down for the trial of cases under the Criminal Procedure Code have to be adopted and following the observations contained in the decisions above mentioned by which I am bound, I am inclined to hold that a decision under section 145, Criminal Procedure Code, cannot be a Judgment within the meaning of the term in section 367.

It is significant to note that sub-section (6) of section 367 enacts that for the purposes of this section an order under section 118 or section 123, sub-section (3), shall be deemed to be a Judgment. Therefore, one can safely assume that the Legislature did not intend to apply the term 'judgment' to the order under section 145, Criminal Procedure Code. The well-known legal maxim *Expressio unius est exclusio alterius* applies to the construction of section 367. This means that when an express provision is made to treat the orders under sections 118 and 123 (3) as judgments, it follows that other orders except those that are finally passed in trials do not come within the category of judgments.

On a reading of the section itself, it will be clear that the final adjudication of the proceedings under that section is not intended to be a judgment at all. Sub-section (4), section 145 lays down that the Magistrate after perusing the statements put in shall hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any), as he thinks necessary and, if possible, *decide* whether any and which of the parties was in possession on the date of the preliminary order.

Sub-section (6) says that if the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) be treated as being in such possession on the date of the preliminary order, he shall issue an *order* declaring such party to be entitled to possession thereof until evicted therefrom. The use of the words '*decide*' and '*issue an order*' indicate that what was intended was only an order and not a final judgment.

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1. (1908) I.L.R. 31 Mad. 543.
2. (1948) 1 M.L.J. 103: (1947) F.L.J. 110.
3. (1939) 2 M.L.J. (Supp.) 23.

Mr. Rangaswami Ayyangar invited my attention to a decision in *Patan Alli Khan* v. *Emperor*[1], where Horwill, J., in delivering the judgment of the Bench on the facts of that particular case, held that in a sessions case where evidence was recorded and arguments heard by one Sessions Judge who dictated the judgment to the shorthand writer, corrected the transcript and signed the judgment after he handed over charge to his successor who pronounced it in open Court on behalf of the Judge who dictated and signed the judgment it was not a valid pronouncement as contemplated by section 367 and therefore could not be taken to be a judgment by which the accused were either legally convicted or acquitted. In support of this view the learned Judge compares and contrasts the provisions of Order XX, rule 2, Civil Procedure Code, and refers to certain proceedings of the Madras Suddar Court dated 11th June, 1861, and of the 7th of August, 1860. Section 350 was also referred to for the purpose of contrasting the provisions of that section which admittedly are not applicable to the proceedings before a Sessions Court. Two decisions of our Court in *Sankara Pillai* In re[2], and *Savarimuthu Pillai* v. *Muthu Pillai*[3], respectively were discussed by the learned Judge and it was held that as section 350 is not applicable to proceedings before a Sessions Court those decisions cannot apply to the judgment in that particular case. There was a further distinction made by the learned Judge, and that was, that in both those decisions the Magistrate continued in the office when he wrote the judgment and it was only delivered by his successor and nothing more; whereas in the Sessions case which was the subject of decision before the learned Judge, the judgment was dictated at a time when the particular Sessions Judge had already handed over charge of his office to his successor. It is not Mr. Rangaswami Ayyangar's contention that this decision is applicable *ad idem* to the present case. All that he wants me to say is that the general principle enunciated therein, *viz*., that a judgment delivered by a Judge in a criminal case who was not the presiding officer and who did not hear the evidence is invalid in law. I cannot accede to this contention for the reason that in the decision in *Patan Alli Khan* v. *Emperor*[1], unlike in the present case the Sessions Judge when he wrote the judgment had handed over charge of his office and was not empowered to function as a judge in that particular Sessions division when he dictated the judgment. So far as the present case is concerned when the Magistrate wrote the order and signed it, he was a Magistrate. It was pronounced in Court by his successor. That section 350 (1) is applicable to proceedings under section 145, Criminal Procedure Code, will be clear from *Anu Shaikh* v. *Emperor*[4], where Harington and Teunon, JJ., were of the view that where a Magistrate who had commenced an inquiry under section 145, Criminal Procedure Code, is transferred and the District Magistrate had made over the case to another Magistrate the latter has power under section 350 to proceed with it without examining the witnesses *de novo*. The proviso to section 350 (1) cannot apply to proceedings under section 145, because the parties to such proceedings cannot be termed as accused nor can the proceedings be designated as trials. In addition, in a very recent case *Venkataswami Naidu* v. *Akkulaiya Naidu*[5], dated 16th January, 1948, the learned Chief Justice has laid down that in respect of proceedings under section 145, Criminal Procedure Code, an action for malicious prosecution is not maintainable because the proceedings under this section cannot be termed as a prosecution.

There is no provision anywhere in the Criminal Procedure Code that an order passed under sub-clause (6) to section 145 shall be pronounced in open Court. All that the section lays down is that the Magistrate shall "issue an order.' Mark the words 'issue an order' in contrast with "pronounce an order." If the Magistrate after deciding that one of the parties is in possession, writes and puts his signature to an order and serves it on the parties through the agency of the police or

1. (1946) 2 M.L.J. 195 : I.L.R. (1947) Mad. 365.
2. (1908) 18 M.L.J. 197.
3. (1916) 32 M.L.J. 81 : I.L.R. 40 Mad. 108.
4. (1910) I.L.R. 37 Cal. 812.
5. C.M.A. No. 378 of 1946 : (1948) 1 M.L.J. Short Notes Page 17.

otherwise that would be a compliance with the provisions of sub-clause (6). It is unnecessary that he should follow the procedure laid down in sections 366 and 367, *i.e.*, that he should pronounce it in open Court or in the presence of the parties. As the marginal note to sub-clause (4) to section 145 itself states, the action of the Magistrate in hearing evidence and coming to a conclusion regarding the possession by either of the parties is only an inquiry and not a trial. These proceedings are only *quasi* criminal in nature where the Magistrate is entitled even to allow costs to the successful party.

In view of the foregoing discussion I conclude that a proceeding under section 145, Criminal Procedure Code, is not a trial, the order issued by the Magistrate under sub-clause (6) of section 145 is not a judgment and therefore the provisions of sections 366 and 367 are not applicable and if at all, the provisions of section 350 alone are applicable. The action of the succeeding Magistrate in pronouncing the order of his predecessor in Court is perfectly justified and is not open to revision which is therefore dismissed.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Rose Mary .. *Petitioner**

v.

T. S. Arulswamy .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488—Mere intimacy or liaison between a husband and another woman—No evidence of cruelty—Not a sufficient ground for wife's living apart.

The occasional lapse from virtue of a husband would not entitle the wife to ask for maintenance under section 488, Criminal Procedure Code. The wife cannot refuse to go and live with the husband solely on the ground of his having a mistress. In the absence of any evidence of ill-treatment or cruelty as would justify a wife's living apart from her husband, the fact of an existing intimacy between her husband and another woman by itself would not be a ground for her to claim maintenance under section 488. But as regards children born to her, the matter rests on a different footing. Where the father neglects to maintain them, in the absence of evidence proving their ability to maintain themselves, they have to be given their maintenance charges by the father. As regards their custody he could take such legal steps as he is entitled and until then he has to pay their maintenance to the mother.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Tanjore, dated 28th May, 1947, in M. C. No. 13 of 1947.

G. Gopalaswami for Petitioner.

K. Venkataramani for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—On the question regarding the maintenance of the petitioner, I am not satisfied that on the evidence there is such ill-treatment or cruelty as would justify her in living apart from the husband. There is some justification for the petitioner's complaint about the respondent's liaison with the woman Sitalakshmi. But the occasional lapse from virtue of a husband does not entitle the wife to ask for maintenance under section 488 of the Criminal Procedure Code, (vide *Amaldoss v. Mrs. Kamala Amaldoss*[1]), where King, J., holds that even when the parties are Christians the fact that the husband keeps a mistress will not give the wife a right to insist that he should give up the mistress as a condition precedent to her living with him. Further a wife cannot refuse to go and live with the husband solely

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* Cr. R. C. No. 745 of 1947. 18th March, 1948.
(Cr. R. P. No. 638 of 1947).

1. (1937) 2 M.L.J. 488.

on the ground of his having a mistress. In an earlier case in *Arunachala* v. *Ananda-yammal*[1], Burn, J., has held that under section 488 of the Criminal Procedure Code the wife can only claim maintenance, *i.e.*, food, raiment and lodging and cannot insist on conjugal felicity and fidelity or even treatment as wife. In view of these authorities, even if the respondent was having intimacy with Seethalakshmi, petitioner cannot put forward that as an excuse for refusing to go to him. I am therefore not satisfied that the order refusing maintenance to the petitioner is wrong.

But the matter rests on a different footing as regards the children. The lower Court does not advert to this aspect of the case at all. There is no proof that the children are able to maintain themselves. It has been found that the respondent has neglected to maintain them. I therefore direct that the respondent do pay Rs. 8 per child per month as his maintenance from the date of the filing of the petition. Regarding the custody of the children, respondent is at liberty to take such legal step as he is entitled. Until then the respondent should pay their maintenance to the petitioner.

This revision is partly allowed accordingly. For payment of arrears, time is granted till 15th May, 1948.

K.C. ——— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Mythili Ammal and another .. *Petitioners**

v.

R. Mahadeva Ayyar and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 33, *rule* 5, *clause* (d-1) *(Madras) and rule* 6—*Application for leave to sue* in forma pauperis—*Right of respondents to show suit is barred by law and adduce evidence—Shutting out of such evidence—Irregularity.*

In an application for leave to sue *in forma pauperis*, it is open to the contesting respondents under Order 33, rule 5, clause (*d*-1) and rule 6 to show that the suit is barred either by *res judicata* or by limitation and adduce evidence. The Court would therefore be not justified in shutting out evidence on behalf of the respondents and an order shutting out such evidence would be materially irregular.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Cuddalore, dated 19th September, 1946, in O. P. No. 10 of 1945.

The Advocate-General (*K. Rajah Aiyar*) and *V. Ramaswami Aiyar* for Petitioners.

K. Parasurama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is against the order of the learned Subordinate Judge of Cuddalore granting leave to the first respondent to sue as a pauper. Three questions were raised before the learned Subordinate Judge by the contesting respondents : (1) Whether the applicant was a pauper ; (2) whether the allegations in the application show a cause of action ; (3) whether the suit is barred by law. On all the three points the learned Judge found in favour of the applicant and granted leave. So far as points 1 and 2 are concerned there is no ground for interference in revision here. So far as the third point is concerned the learned Judge, in my opinion, has not correctly interpreted the provision in Order 33, rule 5, clause (d-1) and rule 6 of the Civil Procedure Code. The view of the learned Judge is that this question also can be decided only on the bare allegations in the petition and that the contesting respondents were not entitled to adduce any evidence. The rule as amended by our Court, clearly says that " where the suit appears to be barred by any law the petition should be rejected " and liberty is given under rule 6 to adduce evidence not only to the applicant but also to the contesting respondents. It would therefore be open to them to show that the suit is barred

1. (1933) 65 M.L.J. 386 : I.L.R. 56 Mad. 913.

* C. R. P. No. 1115 of 1946. 17th November, 1947.

either by *res judicata* or by limitation. The learned Judge, therefore, is not justified in shutting out evidence on behalf of the respondents. These rules have also been construed in two decisions of our Court, the earlier one being *Ramaswami Udayar* v. *Karuppan Chettiar* alias *Saminatha Chettiar*, judgment of Horwill, J., in C. R. P. No. 1055 of 1945 and the other being *Venkatappa Bhatta* v. *Ramayya Bhatta*, judgment of Rajamannar, J., in C. R. P. No. 10 of 1946. The learned Judge in the Court below relied upon the decisions of our Court which considered the point under the unamended rule 5 of Order 33. Needless to say that those decisions have no bearing in view of the alteration in the rule. The result is that this revision petition is allowed and the decision of the learned Subordinate Judge on point 3 is set aside and the original petition is remanded for disposal on that point in the light of the observations contained in the judgment. The costs of this civil revision petition will abide and follow the result.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

The French India Central Transport, Limited .. *Petitioners.**

Certiorari, *writ of—Jurisdiction of the High Court to issue—Order of the Central Road Traffic Board, Madras, in respect of a transport service in the mofussil—Writ of* certiorari *to call for the records and quash that order, cannot be issued.*

The decision of their Lordships of the Privy Council in the *Parlakimedi case*[1] decides the scope and conditions of the exercise of jurisdiction by the High Court in the matter of prerogative writs and that decision must, therefore, govern all cases where there are applications for the issue of such writs.

Where an application was made for the issue of a writ of *certiorari* to call for the records of the Central Road Traffic Board, Madras, and quash its order purporting to allow an appeal in respect of a transport service operating in the mofussil,

Held, though the respondent Board had its offices in the Presidency Town, the subject-matter was entirely outside the original jurisdicitpn of the High Court, as it related to a transport service in the mofussil and as such the decision in the *Parlakimedi case*[1] precluded the High Court from issuing the writ of *certiorari* asked for.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent relating to the matters mentioned in the affidavit of S. L. Sundararaj in support of this application ending with proceedings No. R. 22691/A-1-47, dated 22nd January, 1948 and quash the order of the respondent dated 22nd January, 1948, allowing the appeal of N. V. Bashyam Reddiar and cancelling the extension granted to the petitioners.

Dr. V. K. John of *Messrs. John and Row* and *A. D'Souza* for Petitioners.

The Order of the Court was made by

The Officiating Chief Justice.—This is an application for the issue of a writ of *certiorari* to call for the records of the Central Road Traffic Board, Madras, and quash its order, dated 22nd January, 1948, purporting to allow an appeal by N. V. Bashyam Reddiar and cancelling the order passed in favour of the petitioners by the Regional Transport Authority, Vellore. The subject-matter of this application is a transport service from Cuddalore to Pondicherry, and the petitioners applied on 1st October, 1946, for permits to run two buses on that route. On 21st July, 1947, the Regional Transport Authority permitted the petitioners to run two buses on the route for a period of four months. On the expiry of the period covered by these permits again on 3rd December, 1947, two temporary

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(1) (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457.

* C. M. P. No. 1431 of 1948. 11th March, 1948.

permits were issued for the period from 4th December, 1947 to 3rd April, 1948. Meanwhile, one Bashyam Reddiar, proprietor of another transport service, preferred an appeal to the respondent Board against the decision of the Regional Transport Authority, dated 21st July, 1947 and the respondent, as already mentioned, purported to allow this appeal. The petitioners state that the appeal was not competent and the respondent Board had no jurisdiction to entertain and allow it.

The main question for consideration is, assuming that the respondent Board acted without jurisdiction, whether this Court can issue a writ of *certiorari* in view of the decision of the Judicial Committee in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*[1].

Dr. John, the learned advocate for the petitioners, contended that the decision of the Privy Council need not stand in the way of this Court issuing the writ. Having regard to section 212 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, the learned advocate had necessarily to abandon the position which he was inclined to take up in the first instance that the decision of the Privy Council as such is not binding on this Court. But he contended that each case was only an authority for which it actually decided and that every judgment must be read as applicable to the particular facts proved or assumed to be proved in that case, relying upon the speech of the Earl of Halsbury, L.C., in *Quinn* v. *Leathem*[2]. It appears to us, however, that, what the Judicial Committee decided in the *Parlakimedi case*[1] was as regards the limitation on the jurisdiction of this Court to exercise powers which devolved on it from the Supreme Court. Their Lordships went into the question elaborately and pronounced on the scope of the jurisdiction which the Supreme Court itself possessed and which this Court as its inheritor now possesses. In the case before their Lordships, the Board of Revenue whose order was sought to be quashed was situated within the limits of the Presidency town, but that circumstance was not held to be the deciding factor on the question of jurisdiction. There are two passages in the judgment of Viscount Simon, L.C., which in our opinion contain the decision of the Privy Council in that case :

> "The Board of Revenue has always had its offices in the Presidency town, and in the present case the Collective Board, which made the order complained of, issued this order in the town. On the other hand, the parties are not subject to the original jurisdiction of the High Court and the estate of Parlakimedi lies in the north of the Province . . . . Their Lordships think that the question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing *certiorari* to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court, in the matter of settlement of rents for *ryoti* holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance."

Learned counsel argued that though this decision may be binding in respect of orders passed by the Board of Revenue, it would not apply to a case where the order is passed by a body like the Central Road Traffic Board, because, though this may logically follow, law is not always logical. But we do not agree that it is only by a logical extension of the rule laid down in the *Parlakimedi case*[1], that this Court can be held not to have jurisdiction to issue a writ of *certiorari* in the present case. It is by the actual application of what was decided in the case before the Privy Council that such a conclusion follows. What was decided by their Lordships was the scope and conditions of the exercise of jurisdiction by this Court in the matter of prerogative writs. That decision must, therefore, govern all cases where there are applications for the issue of such writs, and this is certainly one such case. Applying, therefore, the tests laid down by their Lordships, it is clear that in this case though the respondent Board has its office in the Presidency town, the subject-matter is entirely outside the original jurisdiction of this Court,

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1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 at 496 (P.C.).
2. (1901) A.C. 495.

as it relates to a transport service in the mofussil. We hold, therefore, that the decision in the *Parlakimedi's case*[1], directly precludes us from issuing the writ of *certiorari* which the petitioners seek in this application.

The application is therefore dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE GOVINDA MENON.

K. Ramachandriah Setty *Petitioner.**

Encroachment—Prosecution for refusing to demolish structure on encroached land—Evidence in a previous conviction as to encroachment—Not sufficient to prove by itself encroachment in a later case—Separate and independent evidence necessary.

In a prosecution for refusing to demolish a structure built upon encroached land belonging to the Municipality evidence as to a prior prosecution in which the accused was convicted for having encroached upon that piece of land was relied upon. On a contention that it had not been proved that encroachment had in fact taken place,

Held that the previous judgment would not operate in favour of the prosecution to show that there was an encroachment, which had to be provided by separate and independent evidence.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Gooty, dated the 27th day of March, 1947, and made in Criminal Appeal No. 12 of 1947 preferred against the order of the Court of the Stationary Sub-Magistrate of Tadpatri in C.C. No. 846 of 1946.

P. M. Srinivasa Aiyangar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—Rao Bahadur P. M. Srinivasa Aiyangar contends that the lower Courts have not adverted to the crucial point in the case ; namely, whether there was, in fact, any encroachment by the petitioner. There was a previous prosecution in which the petitioner was convicted for having encroached upon a piece of land belonging to the Municipality, and that conviction was confirmed. The present conviction is for refusing to demolish a structure built upon that encroached land. It is clear that the previous judgment will not operate in favour of the prosecution to show that there is an encroachment, which has to be proved by separate and independent evidence.

In the trial Court, P.W. 1 has given *prima facie* evidence that the petitioner has encroached upon a piece of land belonging to the Municipality and built a structure thereon. The petitioner in his statement has denied it generally ; but the evidence of D. Ws. 1 to 3 does not categorically show that the land alleged to have been encroached upon was in fact the petitioner's. No title deed has been produced. In view of the previous prosecution, both the lower Courts do not seem to have concentrated their attention with regard to the ownership of the land and whether there was any kind of encroachment as alleged by the Municipality. In the absence of any clear finding by either of the lower Courts that the petitioner has, in fact, encroached, I am inclined to set aside the orders of both the lower Courts and remand the case for trial to the Court of First Instance which will dispose of it according to law after taking such fresh evidence as the parties deem fit to tender.

K.C. *Petition allowed.*

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1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).

* Cr. R. C. No. 728 of 1947. 23rd January, 1948.
(Cr. R. P. No. 622 of 1947).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE GOVINDA MENON.

C.W. Casse .. *Petitioner.** (*Petitioner*).

Criminal Procedure Code (V of 1898), section 164—Private party, if can apply to have his statement recorded so that it may be used in any subsequent enquiry or trial—Scope and extent of the Magistrate's powers under section 164.

It is not obligatory upon a Magistrate to record the statement of an individual simply because an application is made to him that such a statement may be necessary in an enquiry or trial that may develop as the result of the investigation. It is not all investigations that culminate in an enquiry or trial. Therefore any person who feels that he has useful information to give in connection with the investigation will first of all have to contact the investigating police officer and impart that information to such investigating officer.

It is not necessary that the Magistrate should be moved by the police in order that he might record a statement. There may be instances where the police may not desire to have recorded the statement of a witness for some reason or other. In such a case, there is nothing preventing the witness to go to the Magistrate and request him to record the statement and if a Magistrate records his statement and transmits the same to the Court where the enquiry or the trial is to go on, there is nothing wrong in his action. When a private party seeks to invoke the powers of a Magistrate under section 164, Criminal Procedure Code, the Magistrate has got a very wide discretion in acting or refusing to act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Chief Presidency Magistrate, Madras dated 27th February, 1948, and made in M.P. No. 166 of 1948.

S. Govind Swaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—M.P. No. 166 of 1948 in the Court of the Chief Presidency Magistrate, Madras, was an application by one Mr. C. W. Casse, praying that his statement should be recorded under section 164 of the Criminal Procedure Code in order that it may be used for the purpose of the enquiry or trial which might arise out of crime No. 2 of 1947 investigated by the Special Police Establishment, New Delhi. It does not appear from the proceedings that there was any affidavit filed in support of the petition before the learned Chief Presidency Magistrate ; but from the order of th lower Court it appears that the Court was informed that one Mr. Thompson had been arrested at Bangalore under instructions from the Delhi special police in regard to certain offences said to have been committed by him at Cawnpore. Mr. Casse requested the Magistrate to record his statement under section 164, Criminal Procedure Code, for the reason that the statement would by very important evidence in connection with the proposed enquiry or trial.

The learned Magistrate dismissed that application holding that there was nothing in the application before him indicating as to whether the matter was under investigation or whether an enquiry or trial had not commenced. The petitioner offered to go into the witness box to give evidence with respect to the pending investigation, but that request was refused on the ground that the petitioner was not competent to speak to the factum or to the stage of the investigation and whether the enquiry or trial had not commenced before a Magistrate having jurisdiction to try the said offence. Moreover the lower Court was of opinion that section 164, Criminal Procedure Code, was not intended to enable the accused to secure in advance evidence which he might lead in defence in case he should be tried later on. Another reason for dismissing the application was that to permit such a procedure would be an abuse of the intendment of the seetion. Mr. Govind Swaminathan raised the same contention before me as in the lower Court and urged that the reasons given by learned Chief Presidency Magistrate are unacceptable. According to the learned counsel, on the plain words of the section all that

* Cr. R. C. No. 326 of 1948. 31st March, 1948.
(Cr. R. P. No. 296 of 1948).

the Magistrate need satisfy himself is about the existence of an investigation under Chapter XIV of the Criminal Procedure Code and also that such investigation had not become fructified in an enquiry or trial. I am inclined to hold that it is not obligatory upon the Magistrate to record the statement of an individual simply because an application is made to him that such a statement may be necessary in an enquiry or trial that may develop as a result of the investigation. It is not all investigations that culminate in an enquiry or trial. A large percentage of investigations end in the abandonment or non-initiation of criminal proceedings. Therefore any person who feels that he has useful information to give in connection with the investigation will first of all have to contact the investigating police officers and impart that information to such investigating staff.

In the present case there was no material before the Magistrate from which it could be inferred what the nature of the offences complained was against the alleged suspect Mr. Thompson. Even if Mr. Casse is in a position to speak about the existence or pendency of an investigation, in the every nature of things he will not be competent to speak to the nature and details of the complaint which is being investigated by the police unless Mr. Casse himself was the complainant. That the statement proposed to be given by him was intended to be used on behalf of the defence is sufficient by itself, to indicate that Mr. Casse cannot be the complainant. Therefore it is impossible to predicate with any degree of certainty the correctness of the information likely to be given by Mr. Casse.

Mr. Swaminathan invited my attention to a decision in *Mohamed Cassim* v. *Thumby Sahib*[1], where there is a note by Mosely, J., appended to the judgment indicating that in that particular case the accused and his pleader took certain witnesses to a Magistrate empowered to record statements under section 164 of the Criminal Procedure Code and that after the statements were taken, the record of the proceedings was given to the witnesses themselves or more probably to the pleader. The learned Judge was of opinion that such a procedure was wholly illegal and that under sub-section (2) of section 164 such statements shall be forwarded by the recording Magistrate to the Magistrate by whom the case is to be enquired into or tried. From this note appended to the judgment of the learned Judge, it is argued that it was competent for an accused or his pleader to take a witness before a Magistrate empowered to record a statement under section 164, Criminal Procedure Code, and get the statement of the witness recorded by the Magistrate even though the ivestigating police have not taken the initiative in requesting the Magistrate to record the statement or confession. It seems to me that on a true and correct interpretation of the section, the argument of Mr. Swaminathan is right. It is not necessary that the Magistrate should be moved by the police in order that he might record a statement. There may be instances where the police may not desire to have recorded, the statement of a witness for some reason or other. In such a case, there is nothing preventing the witness to go to the Magistrate and request him to record the statements and if a Magistrate records his statement and transmits the same to the Court where the enquiry or the trial is to go on, there is nothing wrong in his action. But such a thing will be very exceptional, as there is always a discretion in the Magistrate to refuse to record the statement. Ordinarily when a police officer requests the Magistrate to record the statement of a witness on oath under section 164, Criminal Procedure Code, such a request will not be refused by the Magistrate. But when a private party seeks to invoke the powers of a Magistrate under section 164, Criminal Procedure Code, the Magistrate has got a very wide discretion in acting or refusing to act. In this case I do not think that the learned Magistrate has unwisely refused to exercise the discretion.

I do not think that the object to be achieved, *viz.*, that of using the statement to corrobroate the evidence of the deponent to be given in future at the enquiry,

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1. A.I.R. 1940 Rang. 33 at 34.

can legally be permitted. In order that a previous statement of a witness can be used to corroborate the evidence given at an enquiry or trial, the necessary requisites of section 157 of the Evidence Act have to be complied with. The former statement relating to the same fact must have been given at or about the time when the fact took place or before any authority legally competent to investigate the fact. It is not suggested that the Chief Presidency Magistrate is legally competent to investigate some offences alleged to have occurred in Cawnpore. Nor is it stated that the statement proposed to be given under section 164, Criminal Procedure Code, would satisfy the condition that it was given at or about the time when the fact took place. In these circumstances I am not prepared to hold that the lower Court has acted illegally or with material irregularity in the exercise of its discretion.

The criminal revision case is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE GOVINDA MENON.

Subramania Kandar *Petitioner**

v.

Ramaswami Kandar *Respondent.*

Criminal Procedure Code (V of 1898), sections 435 and 439—Revision—Dismissal for default of appearance—Cannot be restored to file.

There is no provision in the Code of Criminal Procedure analogous to Order 9, rule 9 of the Code of Civil Procedure or its equivalent in Order 41, rule 19, Civil Procedure Code and hence a criminal revision petition dismissed for default of appearance cannot be restored to file.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Session of Coimbatore Division, dated 16th July, 1947, and 21st July, 1947, respectively in C.R.P. No. 13 of 1947 and C. M. P. No. 65 of 1947 in C. R. P. No. 13 of 1947 respectively (C.C. No. 55 of 1947 Stationary Sub-Magistrate Court, Dharapuram).

K. Veeraswami for Petitioner.

R. Desikan for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The learned Sessions Judge is perfectly right in holding that a revision dismissed for default of appearance cannot be restored to file. There is no provision in the Code of Criminal Procedure analogous to Order 9, rule 9 of the Code of Civil Procedure or its equivalent in Order 41, rule 19, Civil Procedure Code.

As the complaint was dismissed by the Court of First Instance only under section 203 of the Code of Criminal Procedure, it does not prevent the complainant from filing a fresh complaint, if there are sufficient facts justifying such a course. The order of the learned Sessions Judge is correct. The revision petitions are dismissed.

K.C. *Petitions dismissed.*

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*Cr. R. Cs. Nos. 1158 and 1159 of 1947. 17th March, 1948.
(Cr. R. Ps. Nos. 1045 and 1046 of 1947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

The Coimbatore Transport Ltd., Coimbatore .. *Appellant**

v.

The Governor-General in Council .. *Respondent.*

Companies Act (VII of 1913), S. 162 (v)—Inability of a company to pay a large sum lawfully due and payable as and for income-tax—Right of the Governor-General in Council to apply for winding up of the company—Existence of disputes as to assessments—Resort to winding up proceedings, if an abuse of the process of Court.

Where it is not disputed that a company is unable to pay very a large sum lawfully due and payable by it as and for income-tax, the Governor-General in Council is entitled to apply for and obtain an order for the compulsory winding up of that company.

The mere existence of a dispute as to the assessments which had not been finally determined would not render an application for compulsory winding up, an abuse of the process of Court. The Court might postpone the operation of the winding up order, if the company was at least able and willing to furnish satisfactory security for the amount of taxes due.

Appeal preferred against the judgment and order of the Hon'ble Mr. Justice Clark, dated 26th August, 1947, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 184 of 1947.

Dr. V. K. John and *V. Sriramamurthi* for Appellant.

C. S. Rama Rao Saheb and *S. Swaminathan* for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal from the order and judgment of Clark, J., in a petition filed by the Income-tax Officer, Special Circle, Coimbatore, to wind up the appellant company *viz.*, The Coimbatore Transport Ltd., a private Company registered under the Indian Companies Act. On an objection taken by the appellant, the Governor-General in Council was substituted in the place of the Income-tax Officer as petitioner. The debts on which the petition was founded were due in respect of income-tax and excess profits tax for the year 1941-42 and 1942-43. With a penalty of Rs. 3,200 the total amount due exceeded Rs. 30,000. There appears to have been a slight reduction in the amount payable on account of a subsequent decision of the Appellate Tribunal but it is not disputed that a very large sum is lawfully due and payable as and for the taxes above mentioned.

The only ground on which the petitioner sought a winding up order, at the trial, was that the company was unable to pay its debts (*vide* section 162, clause (*v*) of the Indian Companies Act). The learned Judge found that the company was unable to pay its debts and held that the petitioner was entitled to a compulsory winding up order. He however directed the winding up order to be stayed for a period of one week. If during that time security in the shape of Government paper for the amount of taxes due was deposited in Court, then the application was ordered to be dismissed with no order as to costs. If such security was not supplied within the time fixed, then the winding up order was to stand. No such security was furnished within the time allowed. The company appeals against this order.

It was contended by the learned advocate for the appellant that there was no sufficient allegation in the petition that the appellant was unable to pay its debts and that in any case there was no proof that it was so unable. We agree with the learned Judge that there is no substance in this objection. In the petition it was alleged that the company purported to have sold its buses on the 23rd March, 1946, for a sum of Rs. 1,71,000 but this money was not utilised for payment of the arrears of the taxes. It was also stated that such of the properties as may be traced may not fetch any appreciable sum. The company has been unable to pay the large amount due as taxes in spite of demands. In paragraph 12 of the petition mention is made of the unsatisfactory financial position of the company. The

* O. S. A. No. 70 of 1947. 5th March, 1948.

fact that the company is disputing the quantum of the tax assessed does not by itself prevent the Government from recovering the amount assessed and admittedly the company is not in a position to pay it. There can be no doubt that the petition did allege the inability of the company to pay its debts and the learned Judge was justified in finding that the allegation had been proved. In Re *Gold Hill Mines*[1], the only basis for the allegation that the company was unable to pay its debts was an ordinary statutory affidavit. In *Doraiswamy Ayyar* v. *Coimbatore E. S. Nidhi*[2], there was a vague statement made in the petition but it was not supported by figures or facts and the only fact relied on was the failure to comply with the statutory demand. These decisions cannot have any application to the present case.

It was next contended by Dr. John, learned advocate for the appellant, that there was a dispute as to the assessments and where there is a dispute and such dispute has not been finally determined, it is an abuse of the process of Court to resort to winding up proceedings and this Court should not grant the prayer in such circumstances. It is said that as regards the assessment for the year 1941-42, the company intends to apply to this Court to direct the Income-Tax authority to refer the case under section 66 of the Income-Tax Act and that as regards the assessment for the year 1942-43 there is an appeal pending before the Income-Tax Tribunal. The learned advocate strongly relied on certain decisions in support of his contention, but on an examination of the facts of the cases in which those decisions were given, it becomes apparent that the principle laid down in them has no application whatever to the facts of the present case. In *Satyarazu* v. *The Guntur Cotton, Jute and Paper Mills*[3], the appellant and two others applied for an order for winding up the respondent company. The appellant claimed to be a mortgagee for a considerable sum, but the company did not admit that the mortgage was binding on it. A suit had been filed on the mortgage in which the validity of the mortgage was being contested. While the suit was pending, the application for winding up was made. There was no proof that the company was insolvent. The learned Judges found that the petition was filed with the object of bringing pressure to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts. The learned Judges say :

"The law is perfectly clear that petitions for winding up which are put in in order to obtain an unfair advantage over other creditors at a time when the company is not known to be insolvent amount to an abuse of the process of the Court and should be dismissed."

They point out that there was no reason why the appellant, if the amount was due, should not get her remedy in the usual course by obtaining a decree in the suit instituted by her. It was a case where the creditor, without resorting to the ordinary remedy of enforcing her claim in a Court of law, was attempting to use the winding up provision to coerce the company to pay up disputed debt. In *In re London and Paris Banking Corporation*[4], a creditor of a company whose debt was disputed served a statutory notice and at the expiration of three weeks thereafter filed a petition to wind up the company. In the opinion of the Court, the circumstances showed that the object of the petition was not to obtain a winding up order but to put pressure on the company. There was no evidence of the insolvency of the company other than the non-compliance with the notice. The petition was dismissed. The following passage from the judgment of Jessel, M.R., is informing :

". . . . . . if the debt is *bona fide* contested, and there is no evidence other than non-compliance with the statutory notice to show that the company is insolvent, and the company denies its insolvency (as this company does) I ought to dismiss the petition. I must say, however, that the facts of the case go far beyond what I have stated, and are such as to convince me that this petition has not been presented *bona fide* that is, not with the view of obtaining a winding up order but with the object of extorting from the company a larger sum than they thought was fairly due, under pressure of a threat to present the winding up petition."

1. (1883) 23 Ch. D. 210.
2. A.I.R. 1929 Mad. 265.
3. (1925) 47 M.L.J. 710 : I.L.R. 48 Mad. 267.
4. (1874) L.R. 19 Eq. 444.

To the same effect are the observations of Vaughan Williams, J., in *In re A Company*[1],

"In my judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company."

In *Tulsidas Lallubhai* v. *The Bharat Khand Cotton Mill Company, Ltd.*[2], the petitioner who was an assignee of certain debts due by the defendant company to its late Secretary and Manager, demanded payment from the company; but the company refused to pay on the ground that it believed the claim was fraudulent and unsustainable. The petitioner thereupon applied to the Court to compulsorily wind up the affairs of the company. It was not shown that the company was unable to pay its debts in full. The application was rejected because it was found that the petitioner's object was to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts. In the present case the facts are entirely different. According to the law, and this is not disputed by Dr. John, the Income-tax authorities are entitled to recover the amount assessed by them though an appeal or reference is pending in respect of the assessment and the amount could be recovered by coercive process. This is not therefore a case where the petitioner had to establish his claim in a Court of law before he could proceed to recover the amount due. This is also not a case in which the only ground of insolvency alleged is non-compliance with the statutory notice under section 163 (1) of the Act. We have found that it has been established that the company is unable to pay its debts. It is impossible to characterise the action of the petitioner in filing an application for winding up as an abuse of the process of Court.

Finally Dr. John suggested that in view of the proceedings pending or which he proposes to take in respect of the assessments the petition ought to have been adjourned till a final determination of the validity of assessments. He relied strongly on *Bowes* v. *The Hope Life Insurance and Guarantee Company*[3], in which the petition for winding up was ordered to stand over on the company undertaking to file a bill to impeach the judgment on which the petition was based. The facts of the case however reveal that this procedure was adopted because of certain special circumstances which are absent in the present case. Their Lordships were *prima facie* not satisfied with the genuineness or validity of the debt on which the petition for winding up was based. Lord Cranworth said:

"But here I must confess I cannot say that this debt is so clearly made out to my mind as being a valid debt at law and in equity that I think the Court was bound to direct the winding up, if there was any mode by which the validity of the debt could be better established before that order was made."

Lord Kingsdown said as follows:

"Everybody must feel that (as it is here stated) that this is a case in which there is the gravest possible doubt as to the genuineness and fairness of this transaction. It is clear that it must be investigated, and thoroughly investigated."

In *In re Amalgamated Properties of Rodesia,* (1913) *Limited*[4], the facts were as follows:—An action by company *A* against company *G* was dismissed with costs, and the costs payable by company *A* were taxed at a sum of over £65,000. Company *G* served the company *A* with a statutory demand for payment of the amount and on non-compliance with the demand filed a petition for winding up of company *A*. In the meantime company *A* lodged an appeal from the decision at the trial. Sargant, J., held that the appeal was not a defence to the petition but that a winding up order must be made which must lie in the office for a limited time, and that, if within that time company *A* gave security to the registrar's satisfaction for the amount of the judgment debt, the petition must be dismissed. It may be seen that this order is similar to the order made by Clark, J. There was an appeal from the judgment of Sargant, J., but the appeal was not heard as by consent an arrangement suggested by the Court was agreed to by the parties, *viz.*,

1. (1894) 2 Ch. 349 at 351.
2. (1915) I.L.R. 39 Bom. 47.
3. (1865) 11 E.R. 1383 : 11 H.L.C. 389.
4. (1917) 2 Ch. 115.

company *A* was given the alternative of giving to the company *G* within a limited period a security on its assets. Dr. John suggested that the latter procedure might be adopted and that the company may be permitted to give security on its assets. This suggestion was not accepted by the respondent because according to him the assets were nil and the appellant's counsel was not in a position to deny this fact. We indicated that if the company was willing to furnish security to the satisfaction of the Court for the amount of the taxes due we might be disposed even now to postpone the operation of the winding up order till the validity of the assessments was finally determined. But Dr. John intimated to us that the company found it impossible to furnish any such security. We do not find any ground on which we could postpone the winding up proceedings.

We agree with the learned Judge in the order which he made and the appeal is dismissed with costs.

Dr. John expressed that the company apprehended that the proceedings being taken by the company to challenge the validity of its assessments might not be conducted properly unless they were done with the assistance of the company's officers. The respondent's advocate fairly conceded that he could have no objection to the Official Liquidator permitting the company's officers to assist him in the prosecution of the proceedings which might be taken in respect of the assessments.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE YAHYA ALI.

M.E. Sheik Mohamed and others .. *Petitioners.*

Madras City Police Act (III of 1888), section 46—Conviction under—Facts to be proved.

To sustain a conviction under section 46 of the Madras City Police Act it should be found as a fact that the accused was found gaming or was present for purposes of gaming in a common gaming house. In the absence of a finding that the place where the gaming was going on was a common gaming house, a person taking part in gaming there cannot be convicted under section 46.

Petition under sections 435 and 439 of Criminal Procedure Code, 1898, praying the High Court to revise the order of the Fourth Presidency Magistrate, G.T., Madras, dated 15th April, 1947, in C.C. No. 4081 of 1946.

Mohamed Asker Ali and *A. A. S. Mustafa* for Petitioners.

The Public Prosecutor (*V. L. Ehthiraj*) on behalf of the Crown.

The Court made the following

ORDER.—To sustain a conviction under section 46 of the Madras City Police Act it should be found as a fact that the accused was found gaming or was present for the purposes of gaming in a common gaming house. In the present case there is no finding that the place where the gaming was going on was a common gaming house. On the contrary while acquitting the first accused of an offence under section 45 of the Act the learned Magistrate held that it was not established that the first accused was the occupier of the house and that he was conducting a gaming house. If in view of this conclusion it was felt that some other person was running a common gaming house at that place such finding should have been recorded indicating the evidence upon which it was based. As a matter of fact, there is no such evidence in this case. In this view, the conviction under section 46 of the City Police Act cannot be maintained.

The petition is allowed, the conviction and sentence are set aside, and the fine, if paid, will be refunded.

V.S. *Petition allowed.*

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* Cr. R. C. No. 633 of 1947. 28th November, 1947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Karai Chinnappa Naidu .. *Petitioner**

v.

B. K. Deenadayalu Naidu .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 9, *rule* 9—*Applicability—Application to set aside* ex parte *decree—Applicant absent as he was in jail on the date to which the petition was adjourned—Dismissal of application on his vakil reporting no instructions—Application to set aside such order of dismissal—If lies—Limitation—Limitation Act (IX of* 1908), *Article* 163 —*Applicability—Time if can be extended.*

Order 9, rule 9, applies to voluntary as well as involuntary absences.

Pending a defendant's application to set aside an *ex parte* decree he was arrested and did not appear on the adjourned date. His vakil reported no instructions and his application was dismissed on 8th February, 1946. He was released from jail on 17th October, 1946, and he filed an application on 28th October, 1946, to set aside the order of dismissal.

Held :—As the application was not filed within 30 days of the order of dismissal as prescribed by Article 163 of the Limitation Act, the Court has no jurisdiction to set aside the dismissal for default. The Court has no inherent jurisdiction to extend the time and section 5 of the Limitation Act has no application.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Udumalpet, dated 26th March, 1947, I.A. No. 1069 of 1946 in O.S. No. 428 of 1943.

R. Srinivasa Aiyangar for Petitioner.

T. R. Arunachalam and *R. Mathrubhutham* for Respondent.

The Court delivered the following

JUDGMENT.—An *ex parte* decree was passed against the petitioner, who applied within time to set it aside. While the application was pending, he was arrested on the 4th February, 1946, and did not appear on the adjourned date, the 8th February 1946. His Vakil reported to instructions ; and his application was dismissed. He was released from jail on the 17th October, 1946, and he filed the present application on the 28th October, 1946, to set aside the order of dismissal. The District Munsiff of Udumalpet held that he had no jurisdiction to set aside the dismissal for default ; because the application had not been fieled within 30 days of his order.

It has been held by this Court that when an application under Order 9, rule 13, has been dismissed for default, an application under Order 9, rule 9, to set aside the order of dismissal for default will lie. If so, then under Article 163 of the Limitation Act an application would have to be filed within thirty days of the order of dismissal. It was held in *Sundaresa Iyer* v. *Subba Rao*[1], and in cases which followed it that the Court had no inherent jurisdiction to extend the time, and that section 5 of the Limitation Act had no application to proceedings of this kind.

The argument put forward on behalf of the petitioner is that Order 9, rule 9, applies only to cases of voluntary absence from the Court and not to involuntary absence such as in this case. The wording of Order 9, rule 9, does not suggest that it applies only to voluntary absence. If a person is ill, for example, his absence may be just as involuntary as if he were in jail. The distinction sought to be made is that a person who is ill has still some measure of volition which he can exercise to instruct counsel to represent him in the Court proceedings. It seems to me that the power of a person in jail is greater than that of a person who is ill. There is nothing to prevent a man who was been arrested and is on remand from giving instructions to his legal adviser with regard to his litigation ; and he did presumably instruct vakils in connection with the case arising out of the offence of which he had been arrested. I find no reason for thinking that Order 9,

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1. (1933) 65 M.L.J. 193.

* C. R. P. No. 944 of 1947. 26th February, 1948.

rule 9, does not apply; if so, then admittedly the application was barred by limitation, and the lower Court rightly refused to entertain the application before it.

This civil revision petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE GOVINDA MENON.

Ganeshmal Sait and others .. *Petitioners**

Penal Code (XLV of 1860), section 384—Chief element of the offence under—Accused honestly believing that his money was taken by P.W. 1—Attempt to get it back by intimidation of P.W. 1—Necessary intention absent—No offence.

The chief element in the offence of extortion is intentionally putting a person in fear of an injury to that person or to any other and thereby *dishonestly* inducing the person so put in fear to deliver to any person any property or valuable security, etc. The inducement must be dishonest. It is not sufficient that there should be wrongful loss caused to one individual, but the person putting that individual, in fear of injury must have the intention that wrongful loss should be caused.

Where the accused honestly believed, that P.W. 1 had taken the money belonging to him, his attempt to get it back could not be said to be with the intention of causing wrongful loss to P.W. 1. Hence neither that accused nor the other accused who were only present to assist him with a view to intimidate P.W. 1 can be guilty of an offence under section 384, I.P.C., as the ncessary intention is entirely absent.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Sessions Judge of Trichinopoly in Criminal Appeal No. 18 of 1947, dated 17th April, 1947, preferred against the order of the Court of the 2nd Additional First Class Magistrate, Trichinopoly, in C.C. No. 636 of 1946.

A. V. Narayanaswami Aiyar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—On the findings of the learned Sessions Judge it seems to me that no offence under section 384, I.P.C., has been committed. The learned Sessions Judge in paragraph (3) of his judgment gives the following finding:

"The first accused and the other members were apparently convinced that P.W. 1 had received the bag containing the money from the third accused, and had misappropriated it for his own purposes. They would not therefore listen to the denial made by P.W. 1."

Accepting this finding, the question is whether the offence of extortion as defined in section 383, I.P.C., can be said to have been made out. The chief element in the offence of extortion is intentionally putting a person in fear of any injury to that person, or to any other, and thereby *dishonestly* inducing the person so put in fear to deliver to any person any property or valuable security, etc. So the inducement must be dishonest. If the first accused dishonestly induced P.W. 1 by putting him in fear of injury to himself or to any other to deliver property, his act would amount to extortion. In section 24 "dishonestly" has been defined as:

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

In this case, it cannot be said that by asking for the money which the first accused had lost he was trying to have any wrongful gain. So, the only other portion of the section applicable is "causing wrongful loss." If the first accused's intention was to cause wrongful loss to P.W. 1 he would be guilty. It is not only sufficient that there should be wrongful loss caused to one individual, but the person putting that individual in fear of injury must have the *intention* that wrongful loss should be caused. If the first accused honestly believed, as the learned Sessions Judge finds, that P.W. 1 had taken the money belonging to him (A-1) the attempt to get it back could not be said to be with the intention of causing *wrongful* loss to P.W. 1. Loss

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* Cr.R.C. No. 869 of 1947.
(Cr.R.P. No. 759 of 1947). 18th February, 1948.

might have been caused to P.W. 1 ; but it was not wrongful loss according to the first accused. Such wrongful loss should be caused as a result of an intention. On the findings of the learned Sessions Judge, there is a thorough absence of intention on the part of the first accused to cause wrongful loss and that being so, the offence under section 384, I.P.C., has not been made out. If the first accused is not guilty of the offence, accused 3 to 7 who were only present to assist the first accused with a view to intimidate P.W. 1, according to the learned Sessions Judge, cannot be guilty at all.

The revision is allowed, and the petitioners are acquitted. The fine, if paid, will be refunded.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Public Prosecutor .. *Appellant**

v.

S. M. Vellaiya Mudaliar .. *Respondent.*

Madras District Municipalities Act (V of 1920), sections 216, 317 and 341—Provisional order under section 216 (1) and (2)—Confirmation after prescribed period for showing cause—Failure to carry out order—Starting point of limitation for the commencement of prosecution.

Under section 216 of the Madras District Municipalities Act the owner has the right after service on him of the provisional order to show cause within the prescribed time why the order should not be confirmed. It is only after the expiry of the prescribed time and on failure of the owner to show satisfactory cause that the provisional order can be confirmed and it follows that an offence can be found to be committed only after the passing of the confirming order and its service upon the owner. From the language of section 317 it is clear that it is the final or confirming order passed under section 216 (3) and not the provisional order under sub-section (1) and (2) of section 216 that is contemplated as providing the starting point of limitation for the commencement of prosecution. Hence, a charge-sheet filed within three months of the service of the final order would be within the period of limitation prescribed by section 347 of the Act.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the 3rd Class Magistrate's Court of Karur in B.C. No. 1298 of 1946.

The appellant in person.

G. Gopalaswami for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Public Prosecutor against the acquittal of the respondent of an offence under the District Municipalities Act with which he was charged. On 14th February, 1946, the notice, Ex. P-5, was issued to him under section 216 (1) and (2) of the Madras District Municipalities Act indicating certain defects in construction that were noted during the inspection of his house which were said to be in contravention of the building rules. He was called upon to rectify these defects within a week from the date of the receipt of the notice and was warned that action including prosecution would be taken under the provisions of the Act. Section 216 contemplates that along with this provisional order a notice also should be issued requiring the owner to show cause within a reasonable time to be named in the said notice why the order should not be confirmed and under sub-section 3 of that section if the owner fails to show cause to the satisfaction of the executive authority, the executive authority may confirm the order with any modifications he may think fit to make. In this case notice to show cause and the confirmation order unfortunately were not filed but it would appear they were filed along with the charge sheet and the Magistrate finds that a notice on the above lines was issued on 18th February, 1946, and served on the petitioner's son

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* Cr. Appeal No. 343 of 1947. 14th November, 1947.

on 19th February, 1946, that the terms of the notice not having been complied with within the prescribed time, the provisional order was confirmed by the Commissioner on 5th April, 1946, and that order was served on the petitioner on the 13th April, 1946. As the order was not carried out the present prosecution was launched, the charge sheet having been filed on 3rd June, 1946.

The petitioner was acquitted on two grounds: Firstly, that the notice was served upon the son and consequently the petitioner could not be held liable. This contention is now given up by the learned advocate for the petitioner since admittedly the petitioner is the owner of the property. The second ground upon which the accused was acquitted was that the prosecution is barred by limitation being more than three months after the offence was committed. The learned Magistrate regarded the date of service of the provisional order namely 19th February, 1946, as the date of the commission of the offence and held that more than three months had elapsed by the time the charge sheet was filed. This view is clearly erroneous. Under section 216 the owner has the right after the service on him of the provisional order to show cause within the prescribed time why the order should not be confirmed. It would be futile to say that while giving him that right he would still be deemed to have committed an offence as soon as he received the provisional order and the notice to show cause. It is only after the expiry of the prescribed time and on failure of the owner to show satisfactory cause that the provisional order can be confirmed and an offence can be deemed to be committed only after the passing of the confirming order and its service upon the owner. Section 317 provides that if any person to whom a direction is given by the executive authority to alter or demolish a building under section 216 fails to obey such a direction the owner would be liable to be convicted and from the language of the section, it is manifest that the final or confirming order passed under section 216 (3) that is contemplated and not the provisional order passed under sub-sections 1 and 2 of section 216, as providing the starting point of limitation for the commencement of the prosecution. Section 347 requires a complaint to be made by the executive authority within three months of the commission of the offence and in the present case having regard to the right given to the owner to show cause against the provisional order it must be held that the offence was committed only after the passing of the confirming order and not until then. That order having been served on the owner on the 13th April, 1946, the prosecution is within the time prescribed in section 347.

The learned advocate for the respondent argues that Ex. P-5 does not amount to a provisional order and that no notice to show cause and no confirming order was served upon him. None of these contentions is tenable. A copy of the confirming order under section 216 (3) acknowledged by the petitioner's son is available on record.

The order of acquittal is set aside and the accused is sentenced under section 317 read with section 216 (3) of the District Municipalities Act, to a fine of Rs. 25.

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE GOVINDA MENON.

Sadagopa Naidu .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 133 and 139-A—Parking of buses in Private land—Prima facie *not nuisance—Absence of evidence regarding nuisance to the public—Conviction wrong.*

The parking of buses in sheds built upon private land cannot amount to public nuisance *prima facie.*

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* Cr.R.C. No. 1153 of 1947. 25th March, 1948.
(Cr.R.P. No. 1040 of 1947).

Where there was no evidence whatever that the act of the petitioner in parking buses in sheds upon a private site caused any nuisance to any one and much less to the public at large nor was there any evidence to show that the members of the public had complained against the petitioner for causing public nuisance,

Held, in the circumstances it would be wrong in extending the order under section 139-A of the Code of Criminal Procedure especially when the preliminary order under section 133 of the Criminal Procedure Code was itself wrong.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Additional First Class Magistrate, Tinnevelly, dated 2nd October, 1947, in M.C. No. 47 of 1947.

K. Veeraswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The parking of buses in sheds built upon private land cannot amount to a public nuisance *prima facie*. There is no evidence whatever that the act of the petitioner has caused any nuisance to any one and much less to the public at large. There is nothing to show that the members of the public have complained against the petitioner for causing public nuisance. In the absence of any material before it the lower Court was wrong in extending the order under section 139-A of the Code of Criminal Procedure especially since the preliminary order under section 133 of the Code of Criminal Procedure was itself wrong. The petition is allowed.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Ramarathnam .. *Petitioner**

v.

The Corporation of Madras by its Licence Inspector, Mahomed Safiullah .. *Respondent.*

Madras City Municipal Act (IV of 1919), *sections* 287, 357 *and Schedule VI—Machinery—Meaning of —Electric converter which converts power from A.C. to D.C. and* vice versa*—If "machinery" within the meaning of the term in Schedule VI of the Madras City Municipal Act—Use of such electric converter for repairing or treating radio sets—If amounts to using machinery for " industrial purposes " necessitating the obtaining of a licence.*

Ordinarily a machine is an instrument that transmits force or directs its application and machinery is nothing but a mechanism or a contrivance which performs the function of a machine. In that sense, an electric converter which converts electric power from A. C. to D. C. and *vice versa* is "machinery" within the meaning of the term in Schedule VI of the City Municipal Act as it transmits electrical energy and directs its application. The use of such an electric converter for repairing or otherwise treating radio sets would amount to using machinery for "industrial purposes " and the person so using it without a licence as required by section 287 of the City Municipal Act read with Schedule VI is liable to a conviction under section 357 of the Act read with Schedule VII. The mere fact that a concern is run on a small scale does not take away its industrial character.

Petition under sections 435 and 439 of Criminal Procedure Code, 1898, against the order of the Third Presidency Magistrate Court, Egmore, Madras, in M. No. 3058 of 1946, dated 19th August, 1947.

T. M. Kasturi for Petitioner.

B. Lakkappa Rai for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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* Cr. R. C. No. 1124 of 1947. 13th November, 1947.
(Cr. R. P. No. 1011 of 1947).

The Court made the following

ORDER.—The petitioner has been convicted for having been in possession of machinery and for having used it for industrial purposes without a licence as required under section 287 of the Madras City Municipal Act read with Schedule VI and sentenced to a fine of Rs. 25 under section 357 of the Act read with Schedule VII. The question raised by Mr. Kasturi in attacking the validity of the conviction is that the particular instrument that was used in the present case was not machinery and that it was not used for industrial purposes.

The petitioner is a dealer in radio sets having his shop in Mount Road which is a D.C. area. He also executes repairs to radio sets of both A.C. and D.C. make. Since his shop is served by direct current he cannot test the A.C. sets without the help of a converter; he is therefore using an electric converter for the purpose of converting D.C. current into A.C. to test A.C. sets. The question is whether an electric converter is machinery and whether the user of the converter for the purposes mentioned above is a user for industrial purposes. Ordinarily a machine is an instrument that transmits force or directs its application and machinery is nothing but a mechanism or a contrivance which performs the function of a machine. In that sense there can be no doubt that an electric converter which converts electrical power from A.C. to D.C. and *vice versa* is machinery within the meaning of the term in Schedule VI as it transmits electrical energy and directs its application. It may be also mentioned that in the Factories Act the word "machinery" is explained as including all plant whereby power is generated, transformed, transmitted or applied.

As regards the using of the converter for industrial purposes the expression "manufacturing process" has been defined in the Factories Act as "any process for making, altering, repairing, ornamenting, furnishing or packing, or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal". In the present case admittedly the electric converter is used for repairing the radio sets that are brought to the shop and also for otherwise treating them with a view to their use. The word "industry" itself is a very comprehensive expression and includes any department of business especially one which employs labour and capital. The mere fact that a concern is run on a small scale does not take away its industrial character. I find, for these reasons, that the petitioner was rightly convicted for having used machinery for industrial purposes without a licence as required under the Act. The fine is not excessive. The petition is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

A. KN. V. R. Valliappa Chettiar .. *Petitioner**

v.

P. KL. S. Nachiappa Chettiar and others .. *Respondents.*

Partnership—Manager of joint family being partner in firm—Right of junior coparceners in firm—Suit by junior coparceners for declaration about firm and for account—Appointment of commissioner to take inventory—Propriety.

A contract of partnership entered into by the managing member of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners; and not being partners, the other members cannot interfere with the partnership or maintain a suit for the dissolution of the partnership. Consequently, when the junior members sue for a declaration about the partnership and for the taking of an account they cannot ask for an inventory and inspection of the accounts of the firm, or apply for the appointment of a commissioner for taking an inventory of the

* C.R.P. No. 54 of 1948. 16th March, 1948.

assets of the firm, merely because they suspect or are dissatisfied with the conduct of their managing member.

Gangayya v. *Venkataramiah*, (1917) 34 M.L.J. 271 : I.L.R. 41 Mad. 454 (F.B.), referred to.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Coimbatore, dated 6th January, 1948, in C.M.P. No. 1890 of 1947 in O.S. No. 278 of 1947.

S. Panchapakesa Sastri, *N. C. Vijayaraghavachari* and *N. C. Srinivasan* for Petitioner.

A. C. Sampath Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The order which is sought to be revised was an interlocutory order made by the Principal Subordinate Judge of Coimbatore in O.S. No. 278 of 1947 directing that a commissioner should be appointed to take an inventory of the assets of the firm of which certain of the defendants, including the second defendant were partners, including the monies collected by defendants 2, 11 and 12. The petitioner here is the second defendant in the suit. The suit was brought by the plaintiffs, who are junior members of the family of which the first defendant is the managing member, for a declaration that the plaintiffs were entitled to a half share and the first defendant to the other half share in the partnership assets of the firm of which the first defendant, the second defendant and others were partners ; for an account against the first defendant in respect of the assets and realisations of the family in the partnership ; for payment to the plaintiffs of their half share ; and for the appointment of a receiver with directions to him to institute a suit for dissolution of the partnership for the purpose of getting in the assets. In making his order the learned Subordinate Judge referred to the fact that written statements had not been filed in the suit and observed that at that stage it would be premature to go into the question of the maintainability of the suit, as against the first defendant and the other partners. He directed the appointment of the commissioner to inspect the accounts and take an inventory because he accepted the contention of the plaintiffs that the defendants had been selling the properties. In my opinion the learned Subordinate Judge should not have made an order of this importance as against the petitioner and the other defendants affected unless he was satisfied that they were necessary parties to the suit. Even if no written statements had been filed the second defendant filed a counter-affidavit to the application in which he stated that he was not a proper party and that the plaintiffs had no right to be granted inspection of the partnership accounts.

A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners ; and not being partners, the other members whether divided or undivided cannot institute any suit in respect of the partnership (*e.g.*) a suit for dissolution of partnership. This was decided in *Gangayya* v. *Venkataramiah*[1] by a Full Bench of this Court. In that case Kumaraswami Sastriar, J., pointed out what was the proper procedure to be adopted by a junior member of the family when the managing member refuses to take proceedings against his partners. The learned Judge observed :

"If he refuses or neglects to do so their remedy is to treat the interest of the coparcener in the firm as joint family assets and to sue for partition. In such a suit the assets can be realised by the appointment of a receiver who as representing the partner coparcener can by appropriate proceedings get in what may be due to him."

To such a suit it does not seem that the partners who are not members of the joint family are necessary parties at all. It is not necessary, however, to decide the question in this petition. There may be reasons, why they should be joined as parties which do not appear from the application for inspection and an inventory and the issue may be decided in the suit. As far as the order directing the appointment of the commissioner to inspect and take an inventory is concerned it seems

1. (1917) 34 M.L.J. 271 : I.L.R. 41 Mad. 454 (F.B.).

to me clear that it was wrong and should not have been made. On principle, as laid down in *Gangayya* v. *Venkataramiah*[1], the other members of the coparcenary, whether divided or undivided cannot interfere with the partnership entered into by the managing members of the family; and if they cannot interfere with the partnership and cannot maintain a suit for dissolution of the partnership it seems to me that it would be wrong in principle to allow them to ask the other partners for an inventory and inspection of the accounts merely because they suspect, or are dissatisfied with, the conduct of their managing member. Until either the other coparceners have or the receiver appointed in their application, has been given the right to maintain a suit against the other partners it does not seem to me that orders should be made against the other partners at the instance of the junior members which in effect will allow them to interfere with the affairs of the partnership. The petition is therefore allowed with costs.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Srirangam Municipality .. *Petitioner**

v.

R. V. Palaniswami Pillai .. *Respondent.*

District Municipalities Act (V of 1920), section 249—Notification in the official Gazette—Subsequent amendment by addition of fresh purposes—No fresh publication of amendment—Original notification if sufficient compliance with requirements of section 249.

Section 249 of the Madras District Municipalities Act makes it clear that an omnibus publication of the existing purposes at a particular time will not be sufficient compliance with the statute because the words used are 'any one or more of the purposes specified in Schedule V'. This shows that it is open to the Municipality at a particular time to prohibit the use of any place within the area mentioned in the section for the carrying on of any business or more than one business or all the businesses mentioned in Schedule V.

It cannot be said that when once the Municipality has stated that one or more of the purposes mentioned in Schedule V cannot be carried on without a licence, it is tantamount to saying that such a publication should enure even if the purposes mentioned in the Schedule have been increased by the addition of fresh purposes or decreased by the reduction of certain purposes mentioned therein. Where the original notification is amended, the amendment should also be published in the official Gazette and the original notification cannot be relied upon as sufficient compliance with the requirements of section 249.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Special Bench of Magistrate, Srirangam, dated 14th December, 1946, in S.T. No. 488 of 1946.

V. Rajagopalachari for Petitioner.

K. Subba Rao and *K. Srinivasan* for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The Srirangam Municipality seeks to revise the order of the Special Bench of Magistrates, Srirangam, in S.T. No. 488 of 1946 acquitting the respondent therein of an offence under the District Municipalities Act in that he carried on the business of selling in retail grain, pulses, etc., without taking out a licence from the Municipality under section 249 read with Schedule V of the District Municipalities Act V of 1920. The prosecution case was that during the years 1945-46 the respondent was a dealer carrying on business, in retail, of purchase and sale of grains, pulses, etc., in shop Nos. 82 and 83, South Royagopuram Bazaar,

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1. (1917) 34 M.L.J. 271 : I.L.R. 41 Mad. 454 (F.B.).

* Cr.R.C. No. 250 of 1947. 25th February, 1948.
(Cr.R.P. No. 240 of 1947).

Srirangam; and for the purpose of this business he did not take out a licence as contemplated by the statute. Therefore, he was guilty of an offence punishable under section 313 of the District Municipalities Act. The Municipal Health Officer, Srirangam, was the complainant under the authority granted by the Commissioner of the Municipality. The accused's answer to this charge was that Schedule V, clause (o) of the District Municipalities Act was amended only by G. O. No. 131 Public Health, dated 18th January, 1944, and that thereafter there was no notification published in the District Gazette and by beat of drum that the retail sale of grain and pulses without a licence from the Municipality had been prohibited without a licence as a result of the amendment to the clause (o) of the fifth Schedule. The Municipality, on the other hand, contended that the publication of a notification in the Trichinopoly District Gazette supplement on the 12th August, 1921, stating that no place within the Srirangam Municipality or within a distance of three miles of such municipal limits exclusive of the Trichinopoly municipal limits shall be used for one or more of the purposes mentioned in Schedule V to the District Municipalities Act without a chairman's licence and except in accordance with the conditions imposed by him in the licence was sufficient publication. The Bench of Magistrates accepted the plea of the respondent and acquitted him.

The learned counsel for the Municipality contends that Ex. H, the notification was sufficient compliance with the requirements of section 249 because when once the Municipality has stated that one or more of the purposes mentioned in Schedule V, cannot be carried on without a licence, it is tantamount to saying that such a publication should enure even if the purposes mentioned in the schedule have been increased by the addition of fresh purposes or decreased by the reduction of certain purposes mentioned therein. According to him, what is contemplated by section 249 is that the original publication must be taken as complying with all the future requirements of the statute even though the purposes have been increased or decreased. It is difficult to accept this contention for the reason that section 249 makes it clear that an omnibus publication of the then existing purposes at a particular time will not be sufficient compliance with the statute because the words used are "any one or more of the purposes specified in Schedule V." This shows that it is open to the Municipality at a particular time to prohibit the use of any place within the area mentioned in section 249 for the carrying on of any one business or more than one business or all the businesses mentioned in Schedule V. If the Legislature had intended that an original publication like Ex. H would satisfy the requirements of section 249 even after the addition of fresh purposes, then in my opinion, the words "one or more of the purposes" would not have been used there. The section would have read "shall be used for any of the purposes specified at a time in Schedule V." If the section had been enacted with these words, any addition or subtraction from the purposes will not necessitate fresh publication. Therefore I see no reason to depart from the plain words of the section, put a strained construction on it and thereby enlarge the scope of section 249.

In view of my interpretation of section 249 it is unnecessary to consider the points raised by Mr. Subba Rao for respondent relying on sections 78 to 80 of the Local Boards Act and the decisions in the *Taluk Board, Koilpatti* v. *Volkart United Press Co., Ltd.*[1] and the *Municipal Council of Tellicherry* v. *Mayankutti Keyi*[2]. The revision petition is dismissed.

V.P.S. *Petition dismissed.*

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1. (1935) 42 L.W. 430.
2. (1935) 42 L.W. 684.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Anthoni Udayar and others .. *Petitioners**

v.

Velusami Thevar and another .. *Respondents.*

Penal Code (XLV of 1860), *section* 499, *exception* 9 *and section* 500—*Scope of ninth exception—Good faith—Test—Defamatory statements made in written statement by accused in a rioting case—Statements made in good faith and for protection of themselves—No offence.*

To secure the protection of the ninth exception to section 499 of the Indian Penal Code it is necessary that the imputation should have been made in good faith and for the protection of the interest of the person making it or of any other person or for the public good.

There cannot be any rule of thumb to determine in any particular case whether an imputation is made in good faith or not. Good faith is relative to a great extent and must be determined by the circumstances under which the imputation is made, the social status and level of education of the persons making the imputation and their reasoning capacity.

The petitioners were charged with an offence under section 500, Indian Penal Code, in respect of defamatory statements contained in written statements filed by them in answer to a charge of rioting. It was part of the case of the petitioners that the prosecution for the offence of rioting was at the instigation of *M* who was described in the written statement as a rich and influential man. The Magistrate who tried the case found that this allegation was substantiated to some extent,

Held, (*i*) As it was an integral part of the case for the accused that the prosecution against them was foisted on them at the instance of *M,* any statements connecting any of the prosecution witnesses intimately with *M* and his agents should be deemed to be statements for the protection of the interests of petitioners.

(*ii*) As the petitioners were persons who were not well educated and faced with a serious charge for the offence of rioting and it was also not without reason that they suspected that the whole case had been foisted by a powerful man like *M,* any imputation that they made to attack the credibility of one or other of the prosecution witnesses, must be held to have been made in good faith. In the circumstances, the statements fell under exception 9 to section 499 of the Penal Code and the petitioners could not be convicted of an offence under section 500.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgments of the Court of the Sub-Divisional Magistrate of Ramnad, dated 23rd March, 1946, in C. C. Nos. 253 and 257 of 1945.

V. T. Rangaswami Aiyangar and *R. Santhanam* for Petitioners.

T. Krishna Rao for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—These two revision cases are closely connected. The petitioners are the same in both. They were convicted by the Sub-Divisional Magistrate of Ramnad for an offence under section 500 of the Indian Penal Code in C. C. Nos. 253 and 257 of 1945 on his file and sentenced in each case to pay a fine of Rs. 20 each, in default to suffer simple imprisonment for two weeks.

The charges against them in the two cases are founded on certain statements made by them in the written statement filed by them in C. C. No. 5 of 1945 on the file of the Additional First Class Magistrate, Ramnad, in which case they were the accused. The material part of the written statement filed by them therein marked as Ex. A is as follows :—

"Paragraph 14. P.W. 2's father and his senior paternal uncle were accused along with Chottachami Thevar, father-in-law of Mappilaisami Thevar, in a dacoity case, R.C. No. 5 of 1916 filed by accused 2. P.W. 3, Tirumal Kone's wife is being kept by Mappilaisami Thevar for the past two years and she is given jewels worth Rs. 300 and two bulls and eight kalams of paddy through P.W. 2 every year. The said Chottachami Thevar was keeping his wife's cousin Papathi and she is given ten kurrukams of Kolangorvai."

In C. C. No. 5 of 1945, the petitioners were charged for the offence of rioting. It was a part of the case of the petitioners that the prosecution was at the instigation

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* Cr.R.C. Nos. 597 and 598 of 1946. 13th August, 1947.
(Cr.R.P. Nos. 570 and 571 of 1946.)

of Mappilaisami Thevar who is described in the written statement as a rich and influential man and the father-in-law of the Rajah of Ramnad. According to them, the prosecution witnesses were partisans and satellites of that man. Though it may not be very important, it may be mentioned that the Magistrate who tried the case found that the allegation of the accused that Mappilaisami Thevar and his agents were at the back of the complaint was substantiated to some extent. Whether this be so or not, the petitioners obviously believed that the case was foisted on them at the instance of Mappilaisami Thevar and his agents.

In C. C. No. 253 of 1945 the complainant is one Velusami Thevar, a near relation of Chottachami Thevar, who appears to have died in 1941. In the other case, C. C. No. 257 of 1945 the complainant is Tirumal Kone, who was P. W. 3 in C. C. No. 5 of 1945.

Mr. Rangaswami Aiyangar, learned advocate for the petitioners in both the cases, contended that even assuming that the statements contained in paragraph 14 of the written statement referred to above were defamatory, the statements nevertheless fell within exception 9 to section 499 of the Indian Penal Code and the petitioners were not liable to be convicted of the offence of defamation. To secure the protection of that exception it is necessary that the imputation should have been made in good faith and for the protection of the interest of the person making it or of any other person or for the public good. There is no question here of the imputation being for the public good. It is therefore necessary to determine whether the imputation was made in good faith and for the protection of the interest of the petitioners.

It appears to me to be clear that the statements in question were made for the sole purpose of discrediting the witnesses for the prosecution and in particular P.W. 3. As it was an integral part of the case for the accused that the prosecution against them was foisted on them at the instance of Mappilaisami Thevar, any statements connecting any of the prosecuting witnesses intimately with Mappilaisami Thevar and his agents should be deemed to be statements made for the protection of the interests of the petitioners. It was urged by Mr. Krishna Rao for the complainants in both the cases that the fact that Tirumal Kone's wife is alleged to have been kept by Mappilaisami Thevar does not necessarily lead to the inference that P.W. 3 would be amicably disposed towards Mappilaisami Thevar. Whether this is so or not would really depend upon the circumstances. If Mappilaisami Thevar, as he was alleged to be, was a rich and influential man and highly connected and Tirumal Kone could obtain substantial material benefit by reason of his wife's intimacy with Mappilaisami Thevar, the allegation that on that account Tirumal Kone is likely to be under the influence of Mappilaisami Thevar is not extravagant. It is true that Chottachami Thevar was himself dead at the time the statement was made but Chottachami Thevar was no other than the father-in-law of Mappilaisami Thevar and if he was keeping Tirumal Kone's wife's relation and Tirumal Kone's wife herself was the concubine of Mappilaisami Thevar it cannot be said that the accused were making totally irrelevant statements for their purpose which really was to completely discredit P.W. 3 and P.W. 2 to a certain extent, through whom it was alleged that the jewels and bulls and paddy were given to Tirumal Kone's wife. The statements therefore must be held to have been made for the protection of the interests of the petitioners.

It next falls to be considered whether the imputations were made in good faith. I do not think that there can be any rule of thumb to determine in any particular case whether an imputation is made in good faith or not. Good faith is relative to a great extent and must be determined by the circumstances under which the imputation was made, the social status and level of education of the persons making the imputation and their reasoning capacity. The Magistrate has held that it has not been established that the allegations contained in the statements made by the petitioners are true. That may be so. But that finding is not tantamount to an absence of good faith. Having regard to the evidence led on

behalf of the defence, it cannot be said that there were no facts at all from which persons in the position of the petitioners could not reasonably have formed an impression that there was intimacy between Tirumal Kone's wife and Mappilaisami Thevar and likewise between Papathi and Chottachami Thevar. It cannot be said that the imputations were so reckless that good faith must be deemed to have been totally absent. The petitioners were persons who were not well educated. They were faced with a criminal prosecution for rioting, a serious charge, and it was not without reason that they also suspected that the whole case had been foisted by a powerful man like Mappilaisami Thevar. In such circumstances any imputation that they made to attack the credibility of one or other of the prosecution witnesses must be held to have been made in good faith.

The statements therefore would fall within the ninth exception to section 499' Indian Penal Code, and the petitioners cannot be convicted of an offence under section 500 of the Indian Penal Code.

The convictions and sentences are hereby set aside and the petitioners in both the cases are acquitted. The fines, if paid, will be refunded.

V.P.S. *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Ammani Ammal .. *Appellant**

v.

K. P. Sabapathi Pillai .. *Respondent.*

Civil Procedure Code (V of 1908), section 2 (10) and Limitation Act (IX of 1908), Article 166—Mortgage suit—Title paramount set up by one of the defendants—Question left open in preliminary decree—Final decree passed against all defendants—No reservation of the question of title paramount—Sale and confirmation of sale of hypotheca—Delivery of property—Aggrieved defendant—Necessity to apply to set aside sale—Limitation.

In a suit on a mortgage to recover the mortgage amount by sale of the hypotheca, one of the defendants, the 6th defendant, set up her own title to one of the properties as a defence to the mortgagee's suit. A preliminary decree in favour of the mortgagee was passed, but the question of title of that defendant was left open specifically. Subsequently a final decree was passed against all the defendants in which the clause about the reservation of the question of the 6th defendant's title to that item of property was not repeated. The hypotheca was brought to sale and the sale confirmed in favour of the decree-holder and delivery also was effected. Long after the 30 days after the date of sale, the 6th defendant filed an application to set aside the order of delivery and to direct re-delivery of the property to her.

Held, that the 6th defendant was a judgment-debtor within the meaning of section 2 (10) of the Code of Civil Procedure as a final decree capable of execution had been passed against her. Even if the sale is a nullity and the judgment-debtor has no saleable interest, Article 166 of the Limitation Act applies and the judgment-debtor must have it set aside within 30 days of the date of sale and as the application of the judgment-debtor was filed long after the 30 days allowed, it was barred by limitation.

Muttaluru Veeraraghavayya v. *Venkataraghavareddi*, (1947) 2 M.L.J. 468 (F.B.), followed.

Appeal against the order of the Court of the District Judge of Trichinopoly in E.A. No. 139 of 1943, dated 27th October, 1944, in O.S. No. 85 of 1938, Subordinate Judge's Court, Trichinopoly.

K. S. Desikan for Appellant.

M. S. Vaidyanatha Aiyar for Respondent.

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* A.A.O. No. 27 of 1945. 3rd September, 1947.

The Court delivered the following

JUDGMENT.—This appeal arises out of proceedings in execution. The plaintiff filed a suit on a mortgage to recover the mortgage amount by sale of the hypotheca. The mortgage had been executed by the first defendant for himself and as guardian of his two sons, the second and third defendants. Among the other defendants who were impleaded, the sixth defendant, who is the mortgagor's paternal uncle's son's widow, was impleaded on the ground that she was living in one of the two houses which formed the subject-matter of the mortgage. She in defence set up her own title to that house, namely, house No. 48 claiming that it had fallen to her deceased husband's share in a partition which took place prior to the date of suit. The first issue framed in the suit related to the claim of the sixth defendant. The learned Subordinate Judge who tried the suit considered it unnecessary to decide the question of paramount or hostile title raised by the sixth defendant and leaving that question open he granted a preliminary decree in favour of the plaintiff for the entire suit amount. The preliminary decree directed all the defendants to pay the amount decreed and contained the usual clause relating to the sale of the hypotheca or the necessary portion thereof in case the decree amount was not paid by the judgment-debtors. In the preliminary decree, however, a specific clause was inserted to the effect that the question of title asserted by the sixth defendant to house No. 48 was left open. Subsequently a final decree was passed against all the defendants including the sixth defendant. In that decree the clause about the reservation of the question of the sixth defendant's title to house No. 48 was not repeated. An execution application was filed by the decree-holder and notices were taken out. The sixth defendant refused the notice and consequently the amin affixed it. The Subordinate Judge made a note of this on 25th January, 1940, and declared that the defendants were absent. Thereafter the terms of the proclamation were settled and on 12th February, 1940, an order was made to proclaim and to sell the hypotheca on 3rd April, 1940. On that date the suit property was purchased in Court auction by the decree-holder himself and set off in part satisfaction of the decree amount. The sale was confirmed on 20th June, 1940, and part satisfaction entered. Thereafter a sale certificate was granted and when attempt was made to take delivery there was obstruction on the part of the sixth defendant. On an application made by the decree-holder an order was passed that delivery should be made after removing the obstructions and accordingly delivery was effected. Thereupon the sixth defendant filed $\frac{\text{E.A. No. 1048 of 1940}}{\text{E.A. No. 139 of 1943}}$ in the Court below under section 47 of the Code of Civil Procedure to set aside the order of delivery and to direct re-delivery of the property to her. That application was dismissed by the District Judge and the present appeal is against that order of dismissal.

A number of questions have been raised by Mr. Desikan, the learned advocate for the appellant. He argues that there was no proper service of notice, that in the absence of a declaration by the executing Court that the service was sufficient the sale was not valid and binding, that the question of the sixth defendant's title to house No. 48 having been left open in the suit itself, it was not open to the executing Court to go into it in an application for execution and sale and that there is no constructive *res judicata* arising from such service of notice or from such orders as were passed by the executing Court to proclaim and sell the property or selling the property or confirming the sale. Mr. Vaidyanatha Aiyar for the respondent relies upon the decisions in *Venkata Rayanim Varu* v. *China Bapanna*[1] for the position that a formal order declaring service to be sufficient is not essential when the circumstances of the case indicate that the party concerned knew about the proceeding as it was going on. In that case the learned Judges said that from the circumstances they saw no difficulty in saying that there was an implied though not an express declaration of sufficiency of service. With regard to the plea of constructive

1. (1939) 2 M.L.J. 926.

res judicata which he presses he has argued the question from various points of view. He points out that the appellant was not only a party to the suit but a party to both the preliminary decree and the final decree and that she is therefore a judgment-debtor within the definition of that term in section 2 (10) of the Code of Civil Procedure, under which a judgment-debtor is a person against whom a decree has been passed or an order capable of execution has been made. Even though the question as to her title has been left open in the preliminary decree, the mortgage decree was *eo nomine* passed against her and the preliminary decree directed that the properties including house No. 48 should be sold in the event of default in the payment of the decree amount. The final decree omitted any reference to the reservation of the question as to paramount title and was passed *eo nomine* against the sixth defendant also. It was an executable decree and the executing Court was not competent to question the decree-holder's right to proceed against any part of the hypotheca which was held to be liable to be sold for the realisation of the mortgage amount. He also contends that even if there should be deemed to be some variance between the preliminary decree and the final decree on the question of the reservation of paramount title, the final decree which alone is the executable decree should be executed. He relies in particular on *Parameshwar Dayal* v. *Rambrich Singh*[1], which seems to be on all fours with the present case. The further contention of the learned advocate is that even if notice was not served on the appellant under Order 21, rule 66 of the Civil Procedure Code she must get the sale set aside, especially in view of the fact that it had been confirmed without any objection having been taken by her within the prescribed time. Confirmation of sale, he urges, is a binding adjudication between the decree-holder and judgment-debtor that the property could be sold. For this he cites *Somasundaram* v. *Kondayya*[2]. Lastly, it is contended by him that a judgment-debtor must in a case of this kind come with an application objecting to the sale within thirty days from the date of the sale, the Article applicable being Article 166 of the Limitation Act. For this purpose he relies on a recent decision of a Full Bench of this Court in *Muttaluru Veeraraghavayya* v. *Venkataraghavareddi*[3], C.R.P. No. 296 of 1946 given on 5th August, 1947.

There seems to be no doubt whatever that the appellant is a judgment-debtor within the meaning of section 2 (10) of the Code of Civil Procedure as a final decree capable of execution has been passed against her. It has been held in the unreported Full Bench decision[3] cited above that to such a case Article 166 applies and that even if the sale is a nullity and the judgment-debtor has no saleable interest, if the petitioner is a judgment-debtor he must get the sale set aside within thirty days. In the present case I have already mentioned that the sale was held on 3rd April, 1940, while the application to set aside the order of delivery and to re-deliver the property was made on 12th October, 1940. In view of the Full Bench ruling the application was highly belated and consequently barred by limitation. Upon this finding the appeal falls to be dismissed, and in view of this finding I do not consider it necessary to examine the question of constructive *res judicata* or any of the other questions raised on either side.

The appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

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1. A.I.R. 1939 Pat. 113.
2. (1925) 49 M.L.J. 401.
3. Since reported in (1947) 2 M.L.J. 468 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Nalluru Veera Raghavayya and another .. *Petitioners**

v.

Nalluru Koti Rattamma and others .. *Respondents.*

Civil Procedure Code (V of 1908), *sections* 2 (2) *and* 47—*Order on application for stay of execution—Finality—Appeal—Maintainability.*

If any question arising in execution is determined under section 47 Civil Procedure Code, it automatically becomes a decree by virtue of section 2 (2), whether the order conclusively determines the rights of the parties or not. Consequently, an order on an application for stay of execution would be a decree within the meaning of section 2 (2) of the Code, whether the order directs that execution shall be stayed or that execution shall proceed, and is appealable.

Subramania Pillai v. *Kumaravelu Ambalam,* (1916) I.L.R. 39 Mad. 541 ; *Mst. Durga Devi* v *Hansraj,* (1929) I.L.R. 11 Lah. 402, referred to.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bezwada dated 12th July, 1947, and made in E. A. No. 260 of 1947 in O. S. No. 98 of 1945.

K. Kameswara Rao & *U. Sethumadhava Rao* for Petitioners.

M. S. Ramachandra Rao for Respondents.

The Court delivered the following

JUDGMENT.—An application was filed by the petitioners in the Court of the Subordinate Judge of Bezwada to stay the execution of the decree of that Cour pending in appeal to the District Court, Kistna. Despite the mandatory provisions of Order 41, rule 6 (2) of the Code of Civil Procedure, the stay was refused. Hence this petition.

A preliminary objection has been taken that no revision petition lies ; because the order complained of is an appealable one, it being a decree, since it falls within the mischief of section 47 of the Code of Civil Procedure.

In the old Code under section 244 " the executing Court was bound to decide all questions arising between the parties to the suit in which a decree was passed . . . relating to the execution, discharge or satisfaction of the decree *or to the stay of execution thereof* . . ." The words in italics were omitted from the revised provision in the new Code (section 47) ; and it naturally became a matter of contention whether the omission of these words meant that questions relating to the stay of execution of a decree were deliberately excluded by the Legislature from the scope of section 47, or whether the words had been omitted because it was the well-settled law that questions relating to the stay of execution were questions relating to execution. The former view was taken by the High Court of Allahabad and in some cases in Calcutta, while the latter view was taken consistently in Lahore, as well as in *Subramania Pillai* v. *Kumaravelu Ambalam*[1]. In *Shivabasappa Chinnappa* v. *Harigowda Hoochagowda*[2], the question was left open. This question is of importance, because it would determine whether an order relating to the stay of execution is appealable or not. After four judges in four decisions of the Lahore High Court had all agreed that such an order was appealable, the matter was very fully discussed in *Mst. Durga Devi* v. *Hans Raj*[3], in the light of the decision of that Court and of later decisions in other High Courts ; and the learned Judges held that such an order was appealable. They held that if an order was to amount to a decree, it had (1) to come within the mischief of section 47 and (2) to conclusively determine the question. The learned Judges were of opinion that an order staying execution related to the execution of a decree and, further, that it was a conclusive determination of a question ; because if a decree were stayed it put

* C.R.P. No. 1272 of 1947. 16th February, 1948.

1. (1916) I.L.R. 39 Mad. 541.
2. (1933) I.L.R. 58 Bom. 485.
3. (1929) I.L.R. 11 Lah. 402.

an effective end to the execution of the decree. If the appeal were dismissed, then the decree to be executed in the future would be the appellate Court decree. On the other hand, if the appeal were allowed, there could be no further execution; so, in any event, the determination was final and put an end to the execution of the decree of the trial Court.

There has been no direct decision of the Madras High Court on this point; but it was decided in *Subramania Pillai* v. *Kumaravelu Ambalam*[1] that the scope of section 47, Civil Procedure Code with regard to petitions for stay of execution was the same as the old section 244 and that the omission in the new Code of any reference to stay of execution was because it would be superfluous. It seems to me unnecessary to discuss as fully as was done in *Mst. Durga Devi* v. *Hans Raj*[2], the question whether, as regards the Court passing the order, the order conclusively determines the question. Section 47 says that:

> "all questions . . . . relating to the execution . . . . . of the decree, shall be determined by the Court. . . . ."

and section 2 (2) says:

> "the term 'decree' shall be deemed to include. . . . the determination of any question within section 47. . . ."

So if any question arising in execution is determined under section 47, Civil Procedure Code, it automatically becomes a decree by virtue of the wording of section 2 (2) whether the order conclusively determines the rights of the parties or not; so that it would seem to follow that if the decision in *Subramania Pillai* v. *Kumaravelu Ambalam*[1] was properly decided, then it would directly follow that an order on an application to stay would be a decree within the meaning of section 2 (2) of the Code of Civil Procedure. As affording some indirect support for the decision in *Subramania Pillai* v. *Kumaravelu Ambalam*[1], a reference to the decisions in *Malamal Vittil Krishnan Nair* v. *Kavalappara Mooppil Nair*[3] and *Tirumalai Goundar* v. *Town Bank, Ltd., Pollachi*[4] may be made. In the former case, the learned Judges were considering whether an appeal lay from an order passed under Order 41, rule 5 of the Code. Following the decision in *Ramachandra* v. *Balamukund*[5], they held that it did not, because the order passed under that rule is not an order made by the executing Court; and so section 47 would not directly apply. If the reference—apparently with approval to *Ramachandra* v. *Balamakund*[5] has any significance, then the learned Judges were of the opinion that if the order had been passed under Order 41, rule 6 (2), it would have been appealable; for that was what was held in *Musaji Abdulla* v. *Damodardas*[6] which was approved and distinguished in *Ramachandra* v. *Balamukund*[5]. The question now under consideration did not arise in *Tirumalai Goundar* v. *Town Bank, Ltd., Pollachi*[4] though it may not be altogether without significance that the learned Judges considered the question of stay in an appeal on the assumption that an appeal lay.

The learned advocate for the petitioner sought to distinguish *Mst. Durga Devi* v. *Hans Raj*[2] by pointing out that the argument relating to the applicability of section 2 (2) of the Code would apply to an order of stay of execution, but not to an order refusing stay of execution. In the former case, as the learned Judges pointed out, no further execution of the decree of the trial Court that passed it would be possible; but if stay was refused, then no matter was finally determined, because it would be open to the judgment-debtor to apply again for a stay. There is some force in this argument; but if all questions determined under section 47, Civil Procedure Code, relating to execution . . . . . of the decree are decrees within the meaning of section 2 (2), then no distinction can be drawn between an order directing that execution shall be stayed and an order directing that execution shall proceed.

The petition is therefore dismissed with costs as not maintainable.

B.V.V. *Petition dismissed.*

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1. (1916) I.L.R. 39 Mad. 541.
2. (1929) I.L.R. 11 Lah. 402.
3. (1914) 27 M..L.J. 171.
4. (1934) I.L.R. 58 Mad. 230: 67 M.L.J. 656.
5. (1904) I.L.R. 29 Bom. 71.
6. (1888) I.L.R. 12 Bom. 279.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kalahasti Veeramma .. *Appellant**

v.

Prattipati Lakshmayya and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 41, *rule* 23 *and Order* 20, *rule* 5—*Appellate Court's power to order remand—When to be exercised—Remand on the ground of defect in form of judgment—If justified.*

Any order passed under Order 41, rule 23 of the Code remanding a suit is an appealable Order; and the question that the High Court has to consider in appeal from an order under Order 41, rule 23 is whether the lower appellate Court has given proper reason for remanding the suit. Under the rule, the appellate Court can remand the suit if in reversing or setting aside the decree it considers it necessary in the interests of justice to do so. But it cannot do so without considering the facts. It is only where the appellate Court finds it necessary to reverse or set aside the decree that it is entitled to remand the suit.

Where the judgment of the trial Court contains its findings on all material questions of law and fact, but, is defective in that it did not discuss separately under the heading of the individual issues the evidence bearing on each issue and it recorded its findings on the several issues without giving any summary of the evidence relating to the various issues, an order by the lower appellate Court remanding the suit for fresh disposal on the sole ground that the judgment contravened the provisions of Order 20, rule 5, Civil Procedure Code and without discussing the evidence at all, is improper and has to be set aside. The objection to the form of the judgment of the trial Court is not so much that it contravenes the provisions of Order 20, rule 5 of the Code, which does not seem to require anything more than that reasons should be given for the findings under the individual issues, but rather that it tends to loose thinking.

Appeal against the order of the Court of the Subordinate Judge of Guntur, dated 31st August, 1946, in A. S. No. 157 of 1945, preferred against the decree of the Court of the District Munsiff, Narasaraopet, in O. S. No. 546 of 1942.

K. Kotayya for Appellant.

M. S. Ramachandra Rao for Respondents.

The Court delivered the following

JUDGMENT.—The suit with which we are concerned was one for possession and mesne profits. The trial was a lengthy one. 18 witnesses were examined and a very large number of documents filed. The District Munsiff who pronounced the judgment was not the Munsiff who recorded the evidence ; and after hearing the arguments he wrote a very long judgment extending to more than 11½ pages. Although 9 issues were framed, the learned District Munsiff did not discuss separately under the heading of the individual issues the evidence bearing on each issue. His long judgment discusses from paragraph 14 the various questions that arose in the suit and at the very end he recorded his findings on the several issues without giving any summary of the evidence relating to the various issues. In view of these defects in the judgment, the learned Subordinate Judge in appeal did not discuss the evidence at all and in a few brief paragraphs disposed of the appeal by saying that the District Munsiff did not give any reasons for arriving at his conclusions. He considered that the judgment contravened the provisions of Order 20, rule 5 of the Civil Procedure Code and remanded the suit for fresh disposal.

The type of judgment complained of by the learned Subordinate Judge is no doubt open to serious criticism. Unfortunately, many judicial officers have a habit of clubbing together all or most of the issues and writing a diffuse judgment, without bringing their minds to bear on the particular matters that have to be decided under each issue, and then giving their conclusions on the several issues at the end of the judgment. The objection to that form of judgment is not so much that it contravenes the provisions of Order 20, rule 5 of the Code, which does not seem to require anything more than that reasons should be given for the findings under the individual issues, but rather that it tends to loose thinking ; with the result that the Judge does not keep before his mind the essential points to be considered ; so that the judgment not only loses clarity, but often leads to wrong

* A. A. O. No. 417 of 1946. 19th February, 1948.

conclusions, which would have been avoided if the Judge had discussed the various issues separately. Having said this, however, I do not find the judgment under consideration so bad that it was impossible for the appellate Court to appreciae what the findings of the trial Court were. In almost every paragraph a point which had to be determined was considered and the learned Munsiff's findings given. The appellate Court would have therefore had no difficulty, if it had taken some trouble to ascertain what the findings of the District Munsiff were on the various points that had to be considered in the suit and in the appeal—and presumably the learned counsel would have drawn its attention to the findings and the reasons given for them.

It is argued by the learned advocate for the respondents that although a remand was unnecessary, yet this Court has no jurisdiction to interfere in appeal, since this is not a Court in which decisions on fact can be adjudicated upon. This Court is of course bound by the findings of fact of the lower appellate Court; but we are not now concerned with a case where the suit has been remanded because of contrary conclusions reached on questions of fact by the appellate Court; but one in which the appellate Court refused to take the trouble to dispose of the appeal on its merits, because of the manner in which the judgment had been written by the District Munsiff. Order 41, rule 23 of the Civil Procedure Code sets out the various grounds on which an order of remand can be passed; and if the suit is remanded for some purpose other than those specified in Order 41, rule 23, it seems to me that this Court in second appeal can set aside the order of remand and direct the appellate Court to hear the appeal. Any order passed under Order 41, rule 23, remanding an appeal is an appealable order; and the question that this Court has to consider in appeal from an order under Order 41, rule 23, is whether the lower appellate Court has given proper reasons for remanding the suit.

Originally, Order 41, rule 23 of the Code was not as wide as it is now; and provided for a remand only where the suit had been disposed of on a preliminary point; but under the present rule the appellate Court can also remand the suit, if in reversing or setting aside the decree, it considers it necessary in the interests of justice to do so. But it cannot do so without considering the facts. It is only where the appellate Court finds it necessary to reverse or set aside the decree that it is entitled to remand the suit. It is not necessary in this case to go so far as to say that if the judgment of the trial Court is so completely incomprehensible as to be of no value at all, the appellate Court has no jurisdiction to order the trial Court to write another judgment; but the judgment in this case, as already pointed out, does contain the findings on all the material questions of fact and law.

In my opinion, the lower appellate Court improperly remanded the suit. This appeal is therefore allowed, the order of remand set aside, and the lower appellate Court directed to dispose of the appeal on its merits. Costs will abide the result.

V.P.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Sathirnalan and others .. *Petitioners.**

Cattle Trespass Act (I of 1871), section 24—Forest in a Zamindari treated as reserve forest for some purposes by the application of section 26 and section 32 of the Madras Forest Act—Zamindar's Range Officer seizing trespassing cattle—Rescue of such cattle—Offence.

When a forest in a Zamindary is for some purposes treated as a reserve forest by the application of sections 26 and 32 of the Madras Forest Act, the Zamindar is still the owner and occupier of the same. The forest has not been taken over by the Government as a reserve forest to which all the provisions of the Madras Forest Act are extended. A Range Officer appointed by the Zamindar for the forest is in charge of the forest under the occupier who is the Zamindar, and is entitled to seize

* Cr. R. C. No. 263 of 1947. (Cr. R. P. No. 252 of 1947). 19th December, 1947.

cattle trespassing on land under his charge. People rescuing such cattle which have been thus lawfully seized commit an offence punishable under section 24 of the Cattle Trespass Act.

Emperor v. *Saudagar*, (1915) 32 I.C. 655 and *Dusadh* v. *Sarathi Dusadh*, A.I.R. 1922 Pat. 31 referred to.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Ramnad, dated 16th December, 1946, in C. A. No. 18 of 1946, preferred against the order of the Sub-Magistrate, Srivilliputtur in C. C. No. 1827 of 1946.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to revise the appellate Order of the Sub-Divisional Magistrate, Ramnad, confirming the conviction and sentence of the petitioners herein, by the Stationary Sub-Magistrate, Srivilliputtur of an offence under section 24 of the Cattle Trespass Act and sentencing each of the petitioners to pay a fine of Rs. 50 and in default to undergo simple imprisonment for six weeks each.

Within the ambit of the Zamindary of Seithur in the Ramnad District, there lies a forest by name Sembarambu to which the provisions of the Madras Forest Act have been applied by the Provincial Government and rules to regulate the management of this Forest were promulgated and published in pages 105 to 108 of the Madras Forest Manual, Volume II. The prosecution case is that on the 30th May, 1946, a Forest Range Officer belonging to the Seithur estate when he was inspecting the forest with his watchers P. Ws. 1 and 2, found a herd of cows grazing in a coupe of the forest which is closed for grazing cattle. Under the orders of P. W. 3, P.Ws. 1 and 2 herded the cattle together and were driving them to the cattle pound when the petitioners came to the scene, abused P. W. 1 for driving the cattle to the pound and in spite of the intervention of P. W. 3 to pacify them, prevented P. Ws. 1 and 2 from taking the herd to the pound. The petitioners then prevented P. Ws. 1 and 2 and others from going near the herd, rescued the cows from the watchers and drove them to a village.

For this offence, they were charge-sheeted under rules 6, 8 and 11 of the rules framed under sections 26 and 32 of the Madras Forest Act of 1882 as well as under section 24 of the Cattle Trespass Act. The trial Court found that the petitioners were not guilty of any offence under the rules framed under the Forest Act, but convicted and sentenced them of an offence under section 24 of the Cattle Trespass Act which conviction and sentence were confirmed on appeal by the Sub-Divisional Magistrate, Ramnad.

The question for consideration is whether section 24 of the Cattle Trespass Act applies to the facts of this case. Mr. K. S. Champakesa Aiyangar for the petitioners contends that P. W. 3, the Forest Officer of the Seithur Zamindar who ordered the seizure of the cattle by his watchers P. Ws. 1 and 2 and others does not come within the definition of a Forest Officer as defined under the Madras Forest Act and therefore the seizure of the cattle under his order is illegal. He further contends that in accordance with the rules framed for the management of this forest published in volume II of the Madras Forest Manual, the prohibition against permitting the cattle to trespass or graze in the forest is contained in clause 6 and any violation of that clause is punishable under rule 11 and not under the Cattle Trespass Act. Since the trial Court has found that a breach or infringement of rule 6 has not taken place in this case, the conviction under section 24 of the Cattle Trespass Act is illegal.

I would have agreed with this contention but for the fact that section 24 is specifically charged and both the lower Courts have considered the evidence in the case, in the light of that charge. Section 10 of the Cattle Trespass Act, Act I of 1871

lays down that the cultivator or occupier of any land may seize or cause to be seized any cattle trespassing on such land, etc. etc. It cannot for a moment be disputed that though this part of the Seithur Zamindari is for some purposes treated as a reserve forest by the application of sections 26 and 32 of the Madras Forest Act, still, the Zamindar is the owner and occupier of the same. The forest has not been taken over by the Government as a reserve forest to which all the provisions of the Madras Forest Act are extended. It is only for certain purposes that the provisions of the Madras Forest Act are made applicable to a private forest as can be done by virtue of the power conferred under sections 26 and 32 of the Act. I do not find any difficulty in holding that the Zamindar is the occupier of the land. The question then arises whether the herding together of the cattle and driving them off to a pound for the purpose of impounding were done by the occupier of land or caused to be done by him. It has been held that a person in exclusive possession of land is the occupier of the land and he is entitled to seize the cattle trespassing on the land in his possession. See *Emperor* v. *Saudagar*[1]. A watchman watching the crops on the land of even an occupier, is entitled to seize the cattle trespassing on land under his charge when he is given general instructions to seize them while so trespassing—*Dusadh* v. *Sarathi Dusadh*[2]. P. W. 3 states that he was the Range Officer appointed by the Zamindar for the forest in the Zamindari and therefore it is to be inferred that he is in charge of the forest under the occupier who is the Zamindar. The argument of Mr. Champakesa Aiyangar, if pushed to its logical limit, would lead to the anomaly that where cattle is found grazing on land in the occupation of its owner or occupier nobody but the actual owner or occupier is entitled to seize the cattle and take them to the pound. According to him, any servant or manager ought not to intervene and the owner or occupier himself must physically undertake upon himself the task of driving the cattle to the pound. Such an argument carries with it its own refutation.

If the seizure by P. W. 3 of the cattle is an authorised one the offence under section 24 of the Cattle Trespass Act is complete. In this case, the petitioners rescued the cattle which have been lawfully seized by P. W. 3 and the watchmen under him, and therefore they have committed an offence punishable under section 24.

In view of my conclusion above stated, the other question raised by Mr. Champakesa Aiyangar, that P. W. 3 is not a forest officer within the meaning of the term in the Madras Forest Act and as such, not entitled to seize the cattle does not arise. As the manager if not as a forest officer of the forest under the Zamindar, P. W. 3 is entitled to seize the cattle grazing in the prohibited area and the rescue of such cattle from a person who has lawfully seized the same is an offence to which, as stated, the provisions of the Cattle Trespass Act apply. I am therefore of opinion that the conviction is right and in view of the fact that no actual physical violence was used in the rescue of the cattle, I consider that a fine of Rs. 10 on each of the accused is sufficient to meet the ends of justice. The sentences are reduced accordingly.

V.P.S. — *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

R. Krishnamoorthy Iyer .. *Appellant**

v.

R. Nataraja Iyer and others .. *Respondents.*

Hindu Law—Joint family—Alienation by manager—Degree of prudence expected—Alienation of one item by manager—Absence of necessity or benefit—Equity in favour of alienee—Suit for partition by coparcener—Allotment of property alienated—Determination of share of alienor—Material date.

In the case of an alienation by the manager of a joint Hindu family while on the one hand there would be no justification for treating the manager as if he were the sole owner and to require of him

1. (1915) 32 I.C. 655.
2. A.I.R. 1922 Pat. 317.

* Appeal No. 101 of 1945. 15th April, 1947.

no more prudence than what would be expected in a transaction concerning his own individual property, there is on the other hand no justification for laying down any stricter standard than what would be applicable to a trustee. The expression " *Kutumbarthe* " in the Mitakshara which provides the ultimate textual basis for the doctrine of benefit as applied to a transaction entered into by the manager is elastic and the question is essentially one of fact to be decided on a gathering together of all the circumstances surrounding the transaction at the time when it was entered into, and later events, particularly if they were unexpected at the time of the transaction, should not be taken into consideration.

In working out the equity in favour of an alienee of an item of family property, the alienation being neither for necessity nor for benefit, it is open to the Court to allot the alienated item to the share of the alienating co-parcener where that could be done without prejudice to the rights of the other coparceners. And for this purpose the share of the alienating coparcener should be computed as at the date of the alienation and not as on the date of the partition. Where a coparcener files a suit for partition and the facts are simple, the equity in favour of the alienee can be worked out in that very suit, and the alienee need not be compelled to institute a separate suit for partition.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram, dated 31st August, 1944, in O. S. No. 31 of 1943.

A. V. Viswanatha Sastri for Appellant.

S. Panchapakesa Sastri, T. L. Venkatarama Aiyar, G. Jagadisa Aiyar, S. Nagaraja Aiyar, P. S. Ramachandran, K. S. Desikan and *M. Ramachandran* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant unsuccessfully sued for partition and separate possession of a fourth share of the properties described in schedule A to the plaint and a half share in the properties described in schedules B and C together with past and future profits and certain minor reliefs to which no specific reference is necessary. The relevant relationships are admitted and may be shortly stated as follows. There were two brothers Venkatarama Aiyar and Dharma Ayyar. Venkatarama Ayyar left two sons, Ramaswami Ayyar and Lakshmana Ayyar. Ramaswami Ayyar died on the 17th July, 1931, leaving two sons, the first defendant Nataraja Ayyar and the plaintiff Krishnamurthy Ayyar. Lakshmana Ayyar was the 109th defendant. Dharma Ayyar had a son Subramania Ayyar whose son is Thiagaraja Ayyar, the 4th defendant. The family originally belonged to a village called Thozhudur in Tanjore district. On the 24th August, 1927, Ramaswami Ayyar and Lakshmana Ayyar divided their properties whereby the former got for his share lands in the villages of Kolappad, Thethakudi and Mutharasapuram and a house in Kolappad. On the 10th of July, 1929, Ramaswami Ayyar sold the Kolappad lands and the house for Rs. 99,000 to one Ramachandra Naidu. It is common ground that about Rs. 30,000 out of it was utilised for the discharge of debts. Nataraja Ayyar who joined in the sale deed as an adult was then aged about 19 or 20. The plaintiff however on whose behalf the sale deed was executed was a minor, and it was therefore stipulated that the vendee should execute a promissory note in favour of the plaintiff for Rs. 33,000 with interest at six per cent., per annum, that the amount should be payable to the plaintiff on his attaining majority and on his executing a deed ratifying the sale or earlier if properties of the value of Rs. 33,000 should be purchased for the benefit of the plaintiff and the vendee is given adequate security against the possible claim of the plaintiff after he attained majority. It is not quite clear as to how the balance of about Rs. 36,000 was collected by Ramaswami Ayyar and in fact this is one of the several dark patches in the case. It is however common ground that that amount was collected somehow and was utilised mostly for the expenses of the marriage of a daughter and for other purposes binding on the family leaving even according to the plaintiff's first witness only Rs. 6,000 or Rs. 7,000 by the time of Ramaswami Ayyar's death. P.W. 1 deposes that the wedding of Ramaswami Ayyar's daughter cost as much as Rs. 15,000 or Rs. 16,000 while the fourth defendant who was examined as D. W. 5, states that a sum between Rs. 8,000 and Rs. 10,000 was spent and not Rs. 15,000. This however is immaterial.

With this short family history as the background it will now be convenient to deal separately with the claim in respect of each of the plaint schedules. First as to A schedule properties which are all in Thethakudi village :

On 30th November, 1931, two agreements (Exs. D-1 (a) and D-2 (a) were executed between the first defendant for himself and as guardian of his undivided younger brother, the plaintiff on the one hand and the second defendant on the other. By Ex. D-1 (a) the first defendant agreed for himself and his younger brother to sell to the second defendant their half share out of 211 acres 15 cents of land in Thethakudi village including wet and dry lands for Rs. 13,000. Under Ex. D-2 (a) the second defendant undertook to sell to the first defendant and the plaintiff lands of the total extent of 140 acres 71 cents including wet and dry lands in the village of Thozhudur for Rs. 55,350. On 4th January, 1932, the sale deeds Exs. D-1, and D-2 were executed in pursuance of Exs. D-1 (a) and D-2 (a). Notwithstanding that the documents were drafted as sale deeds there is no doubt that the transaction was in substance a combination of an exchange and a credit purchase whereby while the properties in Thethakudi and Thozhudur changed hands a heavy payment had to be made by the first defendant and the plaintiff to the second defendant or for his benefit in the manner set out in Ex D-2. Apart from the Rs. 13,000 which was the consideration for Ex. D-1 and which was to be adjusted against the price of the Thozudhur lands sold under Ex. D-2, Rs. 1,000 was paid in cash by Nataraja Ayyar, Rs. 3,064-4-0 was adjusted towards a promissory note executed by the second defendant in favour of the first defendant and the plaintiff. The first defendant executed a promissory note in favour of the second defendant for Rs. 1,935-12-0 and the balance of Rs. 36,350 was directed to be paid by the first defendant in discharge of the debts of the second defendant set out in a schedule attached to the sale deed. These debts included an amount of Rs. 12,000 due by way of principal and interest on a mortgage executed in favour of the Tanjore Permanent Fund by the second defendant on the 19th March, 1931, over the properties covered by the sale deed Ex. D-2. There is no doubt that the parties went into possession of the properties which they respectively got under Exs. D-1 and D-2. Nataraja Ayyar was unable to pay the debts which he had undertaken to discharge except to an inconsiderable extent with the result that there were a number of suits by the second defendant's creditors against the first defendant and the plaintiff most of which were decreed against the first defendant alone and the rest both against the first defendant and the plaintiff. The Tanjore Permanent Fund obtained a decree on foot of its mortgage in O. S. No. 20 of 1936 on the file of the Court of the Subordinate Judge, Tiruvarur, against 60 acres 20 cents out of the properties covered by Ex. D-2 and sold them away in the execution of that decree. The second defendant himself obtained a decree in O. S. No. 38 of 1941 on the file of the Court of the District Judge of Negapatam for a portion of the purchase money and subject to the charge for the amount of Rs. 6,924-7-6 due under that decree, the Official Receiver, East Tanjore sold the right, title and interest of the first defendant in the rest of the Thozhudur lands by the sale deed Ex. P-5 dated 30th September, 1943, the first defendant having been adjudicated insolvent on 18th November, 1936, in I. P. No. 9 of 1936 in the Court of the Subordinate Judge of Tiruvarur.

The plaintiff questions the validity of the transaction evidenced by Exs. D-1 and D-2. He disclaims all interest in the lands obtained under Ex. D-2 and seeks to recover his share out of the lands sold under Ex. D-1. These are lands of the total extent of 222 acres 71½ cents in which the 109th defendant admittedly has a half share and the plaintiff therefore claims for himself only a fourth of 222 acres, 71 cents, *i.e.*, 55 acres 68 cents. It is argued on his behalf that the first defendant who was admittedly the manager of the joint Hindu family at that time could not validly convey the plaintiff's a share in view of the circumstances in which the transactions were entered into.

A large number of cases have been cited on both sides as to the principles governing the validity of transactions of this kind. It is unnecessary to discuss these decisions in any detail. It is clear law established as far back as in *Hanoomanpersad*

Panday v. *Mussamat Babooee Munraj Koonwaree*[1] that an alienation by a guardian of a minor or manager of a joint Hindu family can be justified where it is either for legal necessity or "for the benefit of the estate," "need" and "benefit" being distinct grounds of justification. In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*[2], the Privy Council observed that it is impossible to give a precise definition applicable to all cases of what would come under the description "benefit of the estate" and that they are therefore not attempting to do so. They however give three instances of what would obviously be benefits, finally adding that it is difficult to draw a line as to what are, in this connection to be taken as benefits and what not. Relying on the nature of the instances given by the Privy Council in that case there was an attempt in several cases to construe the expression "the benefit of the estate" as confined to transactions which are of a "defensive nature" in the sense of being for the protection and preservation of property. In *Jagat Narain* v. *Mathuradas*[3], however, a Full Bench of the Allahabad High Court repelled the theory that a transaction must be of a defensive character in order to be regarded as being for the benefit of the estate. The Full Bench further held that:

> "a transaction must be judged, not by its actual results but by what might have been expected to be its results, at the time that it was entered into"

and that the degree of prudence which might fairly be required from a person who was not the sole owner of the property might naturally be somewhat greater than that which might be expected in the case of a sole owner and might well be held to be that which could be demanded in ordinary cases from a trustee. In some of the later Allahabad decisions for instance in *Raj Singh* v. *Kishan Lal*[4], there was an attempt to whittle down this principle and lay down that a transaction in order to be justifiable must be so advantageous that a prudent person must certainly enter into it. In *Amrej Singh* v. *Shambu Singh*[5] and *Ramnath* v. *Chiranji Lal*[6], however the correctness of *Jagat Narain* v. *Mathuradas*[3] was re-affirmed. In *Hemraj Dattubuva* v. *Nathu*[7] a Full Bench of the Bombay High Court while no doubt holding that the benefit contemplated by *Hanoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonwaree*[1] need not be of a protective character observed that the Full Bench in *Jagat Narain* v. *Mathuradas*[3] went too far in holding that the question turns on what a prudent owner would do in dealing with his own estate. The Allahabad Full Bench no doubt says in one place that the degree of prudence would be the prudence which an ordinary man would exercise with the knowledge available to him; but they immediately follow this up by stating that when a person is dealing with property of which he is not the sole owner the degree of prudence which would be required of him would be somewhat greater and then they proceed to approximate it to what is required of a trustee. While on the one hand there would be no justification for treating a manager of a joint Hindu family as if he were the sole owner and to require of him no more prudence than what would be expected in a transaction concerning his own individual property, there is on the other hand no justification for laying down any stricter standard than what would be applicable to a trustee. The decision in *Jagat Narain* v. *Mathuradas*[3] was approved by a Bench of this Court in *Sellappa* v. *Suppan*[8] and in an unreported decision in A.S. No. 206 of 1942. The expression "Kutumbarthe" in the Mitakshara which provides the ultimate textual basis for the doctrine of benefit as applied to transaction entered into by a manager of a joint Hindu family is elastic and we do not see any justification for laying down any hard and fast rule restraining its meaning. It is obvious that the question is essentially one of fact to be decided on a gathering together of all the circumstances surrounding the transaction at the time when it was entered into and that later events particularly if they were unexpected at the time of the transaction should not be taken into consideration.

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1. (1856) 6 M.I.A. 393.
2. (1917) 33 M.L.J. 1: L.R. 44 I.A. 147: I.L.R. 40 Mad. 709 (P.C.).
3. (1928) I.L.R. 50 All. 969 (F.B.).
4. A.I.R. 1935 All. 299.
5. (1932) I.L.R. 55 All. 1 (F.B.).
6. (1934) I.L.R. 57 All. 605 (F.B.).
7. (1935) I.L.R. 59 Bom. 525. (F.B.).
8. (1937) 1 M.L.J. 422: I.L.R. 1937 Mad. 906.

The circumstances in which the transaction evidenced by Exs. D-1 and D-2 were entered into have been the subject of elaborate discussion before us.

(After discussing the evidence their Lordships proceeded.)

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The materials on which the validity of the transaction has to be judged are meagre, but giving our best consideration to such facts as can be gathered from the evidence that has been adduced, we are unable to uphold the transaction evidenced by Exs. D-1 and D-2 as beneficial to the estate and therefore binding on the plaintiff.

It has however been argued by Mr. Venkatarama Ayyar for the second defendant that even so his client could claim that the Thethakudi properties should be allotted to the share of Nataraja Ayyar and that those properties would be far below the one half share to which Nataraja Ayyar would be entitled in a partition between him and the plaintiff. It is established by *Ramaswami Iyer* v. *Venkatarama Aiyar*[1], *Dharmarao* v. *Bapanayya*[2] and the unreported judgment of Leach, C.J. and Kuppuswami Aiyar, J., in A.S. Nos. 182 of 1938 and 62 of 1940 and other cases that in working out the equity which had been recognised in favour of an alienee of an item of family property the alienation being neither for necessity nor for benefit, it is open to a court to allot the alienated item to the share of the alienating coparcener where that could be done without prejudice to the rights of the other coparceners. It is equally clear notwithstanding the dissentient note struck in *Sthapathiar* v. *Sivanarayana Pillai*[3] that for this purpose the share of the alienating coparcener should be computed as at the date of his alienation. Assuming, as we must in the absence of any evidence *contra*, that the Thethakudi lands were worth Rs. 13,000 and the Mutharasapuram lands comprised in Schedule C to the plaint were worth Rs. 6,900 as recited respectively in Exs. D-1 and D-7 it is obvious that the two together are less than the amount of Rs. 33,000 which was due from Ramachandra Naidu and that if the Thethakudi and Mutharasapuram lands are allotted to the share of the first defendant there would still be more than half the property out of which the plaintiff's share could easily be satisfied.

Mr. Viswanatha Sastri for the plaintiff cited the decision in *Virupaksha Reddi* v. *Sivareddi*[4], in support of his argument that the value of the properties must be taken as at the time of the division. The learned Judges do not state any authority in support of this proposition; but even assuming that the values of the several properties must be estimated as at the time of partition it has not been shown by any evidence in this case that the properties in Schedules A and C are worth more than the amount of Rs. 33,000 together with interest at 6 per cent. per annum which it has been carrying since 1932. It has also been argued on behalf of the plaintiff relying on *Iburamsa Rowthen* v. *Thiruvenkatasami Naick*[5] that it is open to a coparcener to sue for his share in one or more items of family property which have been alienated by another coparcener without instituting a general suit for partition of the entire family property, that a stranger purchaser cannot compel the plaintiff in such a case to convert his suit into one for general partition and that the only remedy open to such purchaser is for himself to file a suit in which all rights and equities could be worked out and adjusted. We do not regard *Iburamsa Rowthen* v. *Thiruvenkatasami Naick*[5], as laying down an absolute rule that a Court cannot, in a suit by a coparcener to recover his share in an alienated item or items, give effect to the equity in favour of the alienee even where the alienor's share in the family property is easily ascertainable and that the alienee must, even in such a case, be driven to a separate suit. We are unable to see any principle behind any such absolute rule. In most cases no doubt it would not be easy in such a suit to work out the equity as there may be several other coparceners who are not parties to it and several other properties available for division. But where that difficulty does not exist and the facts are simple, there is no justification for compelling the alienee,

1. (1923) 45 M.L.J. 203 : I.L.R. 46 Mad. 815.
2. (1941) 1 M.L.J. 15.
3. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
4. (1943) 2 M.L.J. 87: I.L.R. 1944 Mad. 212.
5. (1910) 20 M.L.J. 743: I.L.R. 34 Mad. 269 (F.B.).

nevertheless, to file a suit for partition. That would lead to unnecessary multiplication of litigation and further, what is in effect a rule of convenience should not be transformed into a rigid rule of procedure to be enforced regardless of circumstances. We are in this matter substantially in agreement with what was said in *Ramaswami Iyer* v. *Venkatarama Iyer*[1]. We do not find either in *Subba Goundan* v. *Krishnamachari*[2] or in *Kandasami Udayar* v. *Velayudha Udayan*[3], anything directly opposed to the view expressed in *Ramasami Iyer* v. *Venkatarama Iyer*[1].

In any view it is not denied that if the alienating coparcener himself files a suit for partition there is no legal impediment to the alienated items being allotted to the share of the alienating coparcener; but it is contended that the present is not such a suit. We are unable to agree with this argument. On a fair reading of the plaint it is abundantly clear that the suit is one for general partition.

(After setting out the averments in the plaint and the written statement and the facts relating to the claim of the plaintiff for partition and allotment of the properties in the hands of the alienee, the Court proceeded.)

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In this case it is a matter of indifference whether that equity can be regarded as arising on the date of the alienation in 1932 or on the date of the present suit. The result is in either view the same. It is true that the Official Receiver representing the estate of the first defendant was a party to O.S. No. 9 of 1943, but we are unable to see how the adjudication in that suit would bar the defendants from seeking their equity. We are therefore of the opinion that the plaintiff is not entitled to claim a share in the properties in Schedule A as he is in possession of family assets far exceeding in value the properties set out in that schedule and in Schedule C.

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The appellant will pay one set of costs to all the contesting respondents divisible among them according to the value of the properties held by each and they will also be entitled to their printing charges.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

W. Kanniah Lal by his duly constituted agent W. Narasingh Prasad .. *Appellant**

v.

The Corporation of Madras by its Commissioner .. *Respondent.*

Madras City Municipal Act (IV of 1919), section 304 (as amended in 1936)—Calculation of licence fee under—Gross income—How to be computed where owner had leased the market to a contractor for a fixed sum per month.

Where though the owner of a market had leased it to a contractor for a fixed sum per month, the Corporation is entitled under section 304 of the Madras City Municipal Act, as amended in 1936, to demand from the owner 15 per cent. of the gross income from the market ignoring the sum actually received by the owner from the contractor.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 665 of 1945.

V. Rajagopala Mudaliar for Appellant.

Messrs. John and *Row* for Respondent.

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1. (1923) 45 M.L.J. 203 : I.L.R. 46 Mad. 815.
2. (1922) 42 M.L.J. 372 : I.L.R. 45 Mad. 449.
3. (1926) 51 M.L.J. 99 : I.L.R. 50 Mad. 320.

*C.C.C.A. No. 17 of 1947. 20th February, 1948.

The Court delivered the following

JUDGMENT.—For a long period the plaintiff has been the owner of a market at Mylapore. In the preceding year with which we are concerned, he leased the market to a contractor who, under the terms of the lease, paid him a fixed sum of Rs. 225 a month, the contractor being allowed to collect what he could from the various stall holders in the market. In 1936 there was an amendment to the City Municipal Act, whereby the Municipality was entitled to demand as licence fee 15 per cent. of the gross income of the owner from the market in the preceding year. Purporting to act under this section, the Revenue Officer of the Corporation demanded of the plaintiff a licence fee equal to 15 per cent. of the gross income from the market, although the plaintiff himself received a sum of only Rs. 225 a month. Criminal proceedings were instituted ; and in order to settle the question that there arose the plaintiff filed the present suit for a declaration that the licence fee payable by him was only Rs. 405. The suit was dismissed.

The argument on behalf of the plaintiff is that he was the owner of the market and that since the section referred to the gross income of the owner from the market, the Revenue Officer of the Corporation was not entitled to ignore the words " of the owner " and to charge a licence fee of 15 per cent. of the gross income from the market. Dealing with that point the learned Additional Judge of the City Civil Court said :—

> " If the term ' income ' had been used in the section, it would have meant the net income, and then the construction suggested by the plaintiff would have been correct. . . . . .By the use of the term ' gross income ' it is clear that what was meant was the income which was derived from the market without deducting the expenses of collection, management, etc., ... The contractors in this case must be deemed to be nothing but agents of the plaintiff. The income derived from the various stall holders is therefore the gross income of the plaintiff though after allowing the contractors something for managing the property and for making the collections, he is receiving a lesser sum every month as representing the net income from the market."

We are not concerned with the legal relationship between the plaintiff and his contractor. Suffice it to say that the plaintiff was not entitled to receive from the contractor anything more than the sum of Rs. 225 agreed upon, however little the gross income from the stalls might have been. So that there was no relation between the amount received by the plaintiff and the gross income from the stalls. The sum received by the plaintiff as a result of his contract cannot therefore be regarded as the gross income minus some sum allowed for the expenses of collection. The argument of the learned Additional City Civil Judge therefore seems fallacious.

In this Court the learned advocate for the Corporation has laid emphasis on the definition of ' owner ' in section 3 (17) of the Act, which says that " owner " includes the person for the time being receiving or entitled to receive . . . . the rent or profits of the property in connection with which the word is used . . . . . This definition of " owner " would clearly therefore include the lessee. That does not however mean that the plaintiff, who is the owner in the general sense of the word, was not a owner within the meaning of the Act. Both he and his contractor were owners. If that is so, and the word ' owner ' in section 304-B is taken to include the plural as well as the singular, then the gross income of the owner from the market was the gross income from the market and the fee was rightly calculated.

It is argued that if this meaning be placed on the word " owner " in section 304-B the result would be that the word " owner " must be interpreted in section 304 in one way and in section 304-B in another ; for the person who applied for the renewal of the licence was not the contractor and the plaintiff, but the plaintiff alone. I do not think that this is any real objection to the interpretation of section 304-B given above. Section 304-B refers to the state of affairs in the preceding year. Supposing, for example, that in the previous year there were two joint owners and each of them received a half of the gross income from the market and in the year in which the new licence was sought, only one of the two joint owners applied ; could it then be said that because that owner had received only a half

of the gross income from the market, that he should receive a renewal of the licence for the whole market on the payment of a fee calculated on half the income? Clearly not. The word "owner" in section 304 must be taken to refer to the person who is conducting the market in the year in question, while the word "owner" in section 304-B refers to the owner in the preceding year.

In view of the above finding it is not strictly necessary to consider some of the other points raised by the learned advocate for the Corporation in support of the judgment of the lower Court. One of his arguments is to the effect that the Rs. 225 received by the plaintiff is but the net income. Enough has been said on that question in the preceding paragraph. The other argument is that the lease by the plaintiff was not a valid lease and that since no oral evidence is permissible to prove an unregistered lease that should have been registered, there is no legal evidence of a lease. That however seems to me to be beside the point. What we are concerned with in this case is not whether there was, or was not, a valid lease or what were the rights of the plaintiff and his contractor; but the gross amount received by the plaintiff from the market. It seems to me immaterial whether he received the Rs. 225 as a lessor entitled to receive that amount from his lessee or whether he received it on a contract that was not legally enforceable.

In the result the appeal is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE TYAGARAJAN.

A. K. Govindarajulu Naidu .. *Appellant**

v.

L. A. K. Lakshmana Aiyar Firm .. *Respondent.*

Limitation Act (IX of 1908), Article 182 (5)—Execution application "recorded"—If a final disposal of the application—Application for actual possession by decree-holder purchaser—Actual possession not possible to be given—Duty of Court to give symbolical possession—Failure to make such order—Subsequent application—One to bring up a pending application and to have suitable orders passed.

The use of the word "recorded" on an execution application in no way amounts to a final disposal of the application. Seeking actual possession in an application in execution does not prevent, when actual possession cannot be immediately obtained, an order being made for delivery of symbolical possession when the decree-holder is entitled to it and the Court is bound to make such an order.

Where a decree-holder purchaser applied for delivery of possession of two houses and delivery was ordered in respect of one and as there was obstruction by a person who claimed a right of residence regarding the other, the Court ordered the petition to be "recorded". In an application long after three years after the above order, the decree-holder purchaser sought to continue the prior petition.

Held, that the decree-holder in the circumstances ought to have been given symbolical possession and as the execution application had not been finally disposed of it was still pending and the decree-holder was entitled by his later application to have it brought up before the Court and to have orders passed upon it in accordance with his rights.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, dated 28th September, 1945, in E.A. No. 598 of 1945 in O.S. No. 141 of 1932.

S. V. Venugopala Chari for Appellant.

T. V. Ramanatha Ayyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the judgment-debtor in O.S. No. 141 of 1932 wherein a sum exceeding Rs. 12,000 was decreed by the learned Subordinate Judge of Trichinopoly on the 31st August, 1933. In execution of the decree the decree-holder instituted E.P. No. 392 of 1934 for sale of certain properties belonging to the judgment-debtor, which had been attached pending

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*A.A.O. No. 115 of 1946 and C.R.P. Nos. 1474 of 1945 and 289 of 1946. 11th September, 1947.

suit. Sale was ordered and on the 20th November, 1935, the decree-holder became the purchaser. The sale was confirmed on 27th July, 1936 and part satisfaction of the decree was recorded in respect of the net sale proceeds. Two of the items of property sold were houses Nos. 9 and 10, Sayakara Street, Trichinopoly. In order to obtain possession, the decree-holder instituted E.A. No. 857 of 1936 and possession was ordered. When the Amin went to give delivery to the decree-holder, on 12th November, 1936, obstruction was offered by one Ayyammal, the widow of the judgment-debtor's brother. She claimed right of residence during her lifetime in both the properties, Nos. 9 and 10. Thereupon the decree-holder filed E.A. No. 983 of 1936 on 4th December, 1946, to remove the obstruction pursuant to Order 21, rule 97. On 31st August, 1937, the Court found in favour of the obstructor, so far as No. 9 was concerned, being satisfied that she was entitled during her lifetime to residence in that house. Her claim regarding house No. 10 was rejected. In the course of the order it was observed by the Court that the decree-holder was directed to establish his right by a separate suit. On 31st August, 1937, E.A. No. 857 of 1936 came up for consideration, when delivery of possession of house No. 10 was ordered and the matter was adjourned until 2nd October, 1937, to enable delivery to be given. The B diary in respect of E.A. No. 857 of 1936 contains an endorsement including "*vide* order in E.A. No. 983 of 1936". The decree-holder was duly put in possession of No. 10. On the 2nd October, E.A. No. 857 of 1936 again came before the Court and an order was made which was endorsed upon the application, as follows:

"House bearing door No. 10 delivered. Recorded."

Thereafter the decree-holder, by other execution applications, sought to obtain the fruits of his decree, so far as they were unsatisfied by the proceeds of the sale arising out of E.P. No. 392 of 1934, but he was unsuccessful. The last of those applications was dismissed on 30th January, 1942. On 23rd June, 1945, the decree-holder instituted E.A. No. 411 of 1945. That was more than three years after the dismissal and final disposal of the last execution application and about eight years after E.A. No. 857 of 1936 had last been before the Court. By E.A. No. 411 of 1945 it was sought to continue, or to revive, E.A. No. 857 of 1936 on the ground that it had never been finally disposed of and was still pending and to obtain symbolical possession of house No. 9, that in which the widow of the judgment-debtor's brother had right of residence, it being appreciated that during her lifetime actual possession could not be obtained. Symbolical possession of house No. 9 had not been directed on the last occasion when E.A. No. 857 of 1936 was before the Court. No notice was given to the judgment-debtor of E.A. No. 411 of 1945 and the Court directed symbolical possession of house No. 9 on 5th July, 1945 and which was given on 31st July. The present matters coming before us are C.M.A. Nos. 115 of 1946 and C.R.P. No. 1474 of 1945, instituted by the judgment-debtor challenging the correctness of the order made on 5th July, 1945, in E.A. No. 411 of 1945.

Learned counsel for the appellant judgment-debtor, first contended that, since the decree-holder had instituted other execution applications between 1937 and 1945, it must be deemed that he has abandoned any rights, which otherwise he might have, with regard to E. A. No. 857 of 1936 as he sought execution against other properties belonging to judgment-debtor.

I am unable to accept that argument. So far as the judgment-debtor is concerned the properties, including Nos. 9 and 10, were sold in execution of the decree and the judgment-debtor, after he had unsuccessfully objected to confirmation of the sale, took no step whatever with regard to those properties; the net proceeds of the sale were insufficient to discharge the decretal debt. The subsequent applications in execution were for the purpose of recovering the balance due to the decree-holder pursuant to the decree. In support of this contention reference was made to *Maharaj Bahadur Singh* v. *A. H. Forbes*[1] a decision by their Lordships of the Judicial Committee. In that case it was held, upon the facts, that there had

1. (1929) 57 M.L.J. 184 (P.C.).

been an abandonment inasmuch as the decree was sought to be treated as a money decree, when apparently it was not, and execution had been attempted to be made upon properties other than those in respect of which the decree was passed. In my view that decision of the Board is in no way in point. I can see no substance whatever in the argument that the decree-holder had abandoned any rights which he may have in regard to the earlier execution application by reason of proceedings, which he was entitled to institute, to recover the balance of the sums due to him under the decree.

It was next argued that, since more than three years had elapsed between the last disposal by the Court in E. A. No. 857 of 1936 and the filing of E. A. No. 411 of 1945, the latter application is time barred. Support for the contention was sought to be obtained from a decision of a single Judge of the Allahabad High Court in *Mst. Basanti* v. *Sirdhar Mal-Hardit Rai*[1]. There, it was held that since more than three years had elapsed before an undisposed execution application was sought to be revived or continued, an application to revive or continue was time barred. I am unable, with respect, to agree with that decision. If it is correct, then it seems to me that when an execution application is pending in Court, the same consequences affect it as would be the case had it been finally disposed of, that is to say, the provisions of Article 181 of the Limitation Act are sought to be applied to a pending and undisposed execution application.

It is to be recalled that the last matter in respect of E. A. No. 857 of 1936 on 2nd October, 1937, was, as stated above, that an endorsement was made that possession had been given of house No. 10 to which is added the word "recorded." That word in no way amounts to final disposal of an execution application. The use of such a word, and of other words such as "struck off" has been condemned on many occasions by this Court. In *Pattanayya* v. *Pattayya*[2], it was observed by Devadoss, J., delivering judgment with which Waller, J., agreed, as follows :

> "If instead of following the procedure laid down by the Code, the executing Court orders that the petition be lodged or recorded, or be struck off, such an order is not one sanctioned by the Code and it only amounts to this : petition is adjourned *sine die*."

In that case an execution application for possession of certain items of property was filed on 11th March, 1915 ; delivery of the properties was ordered on 21st July, 1915 ; some third parties objected to delivery ; objection was removed with regard to one item which was delivered on 27th March, 1916, on which day the Court passed an order that the item in question was delivered to the decree-holders and the petition was "recorded" ; subsequently, a suit filed by the obstructors for delivery of another item was dismissed ; on 3rd September, 1921, the decree-holders filed an execution application and prayed for delivery of the item, the subject-matter of the dismissed suit ; that was about six years after their application for possession had been made ; it was held that they were entitled to succeed, that the previous application was still a pending one, that it was still on the file and could then be dealt with. A Full Bench of this Court in *Abdul Azim Sahib* v. *Chokkan Chettiar*[3] held that, when an execution application has not proceeded to final disposal, it remains to be dealt with by the Court.

In the application No. 857 of 1936, the decre-holder asked for actual possession of house No. 9 as well as of No. 10. When it was instituted he could have had no knowledge that there was any objection against the Court ordering what was sought. It was only when the obstruction arose from the judgment-debtor's sister-in-law on the ground that she was entitled to right of residence, that he became aware that his right to actual possession might have to be postponed before it could be satisfied. Seeking actual possession in an application in execution does not prevent, when actual possession cannot immediately be obtained, an order being made for delivery of symbolical possession when the decree-holder is entitled to it. In the present instance actual possession of house No. 10 was ordered and was obtained

1. A.I.R. 1927 All. 802.
2. (1925) 50 M.L.J. 215.
3. (1935) 69 M.L.J. 821 : I.L.R. 58 Mad. 893 (F.B.).

because the obstructor had no right in regard to that house. There was no objection by the judgment-debtor and no obstruction by him. The learned counsel for the judgment-debtor emphasised that his client had not been served with all proceedings. That may well be but I cannot close my eyes to the likely prospect that he knew exactly the whole position throughout. In any event he must have been aware that possession was likely to be sought inasmuch as the decree-holder was the purchaser. It is not suggested that there is any reason against the decree-holder being given actual possession of the two houses save that the sister-in-law is entitled to a right of residence during her lifetime in house No. 9. That being so, clearly the decree-holder should have been given symbolical possession of that property in the same way as he would have been entitled had there been a tenant for years in occupation. Since E. A. No. 857 of 1936 was not disposed of finally, it remained a pending application and execution application No. 411 of 1945 was, to use the language in one of the cited cases, an intimation to the Court that the decree-holder wished to exercise the right he had with respect to that application. In my opinion the decision of the Court below was correct. E. A. No. 857 of 1936 had not been finally disposed of, it was still pending and the decree-holder was entitled, by E.A. No. 411 of 1945, to have it brought before the Court—I do not use the word " revived " as I am not sure it is strictly apt—and to have orders passed upon it in accordance with his rights.

Some point was made that in E. A. No. 983 of 1936 the order includes that the decree-holder was directed to establish his right (to possession) by a separate suit (to which order reference is made in the B diary of E. A. No. 857 of 1936) and that no suit had been instituted. It would have been worthless to have sued the sister-in-law when she is entitled to right of residence in No. 9 and the decree-holder's rights under E. A. No. 857 of 1936 are not affected by such suit not having been instituted.

For reasons given, in my view, C. R. P. No. 1474 of 1945 should be dismissed with costs.

It will follow that C. M. A. No. 115 of 1946 and C. P. R. No. 289 of 1946 which are applications to revise the order refusing to review the previous decision and where the same facts and considerations arise, should also be dismissed with costs, one set.

Tyagarajan, J.—I agree and have nothing to add.

V.S. *Petition and Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Mudduleti Buggappa and another .. *Petitioners.**

Madras Food Grains Control Order (1942)—Father of joint Hindu family guilty of contravention o the provisions of—Son in control of the food grains as junior member of the family—If also liable.

Where a father of a joint Hindu family, who is the licensee, is found guilty of having stored for sale quantities of Bengal gram in excess of that allowed in the licence under the Madras Food Grains Control Order, his son cannot be convicted of having stored the grains in question when there is nothing to show that except in the capacity of a junior member of the family he was in control of the said grains.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Gooty, dated 5th July, 1947, in C. C. No. 27 of 1947.

P. M. Srinivasa Aiyangar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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* Crl.R.C. No. 888 of 1947. (Crl.R.P. No. 777 of 1947). 23rd January, 1948.

The Court made the following

ORDER.—I am not satisfied that the son, the second petitioner, can be convicted of having stored for sale quantities of Bengal gram in excess of that allowed in the licence in favour of his father, the first petitioner. There is nothing to show that except in the capacity of a junior member of the family the second accused was in control of the 1,200 seers of Bengal gram seized by P. W. 2, the Commercial Tax Officer. As laid down by this Court in *M. Muniswami Goundan*[1], where the manager of the family is the licensee, it cannot be said that any junior member of the family by engaging himself in the family trade, can be found guilty for not having a separate licence in his own name. Considering the circumstances that in the case of a joint family consisting of the father and the son as it is a common practice for the son to help the father in carrying on the business, it does not mean that the son himself is either in sole possession or stored the articles which the family deals in. In these circumstances the conviction of the second petitioner cannot stand and he is therefore acquitted.

As regards the first petitioner, I see no reason to doubt the evidence of P. W. 2 and that of the attesting witness P. W. 1. More than the permitted quantity of Bengal gram was found in the business premises of the family. Mr. Srinivasa Aiyangar's contention that in the charge it is not specifically stated that there was a storage for sale, does not appeal to me in view of the fact that P. W. 2 states in his evidence that these bags of Bengal gram were found in the business premises of the first petitioner and it is also admitted that the first petitioner had licence for purchasing and selling grains and other commodities in retail. Therefore it is permissible to infer from this as the Magistrate has done, that the storage of this excess quantity was for sale. The conviction of the first petitioner is therefore right and the sentence is not excessive. It is pointed out that the entire quantity of Bengal gram has been confiscated and not the excess quantity, the storage of which alone will amount to an offence. In modification of the order of the lower Court I direct that the quantity of Bengal gram in excess of the 25 maunds alone be confiscated. The petition so far as the first petitioner is concerned is dismissed and so far as it concerns the second petitioner it is allowed.

V.S. *Petition allowed as regards the second petitioner only.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE BELL.

A. S. Duraiswamy Mudaliar and another .. *Appellants**

v.

Muhammad Amiruddin and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938)—Money decree—Payment by judgment-debtor—Ordinary rule of appropriation first towards interest and then principal—Applicability—Principle not affected by provisions of the Act.

The principle of law which has been observed and recognised is that when a payment is made in respect of principal and interest, there is an inference that the payment is ordinarily first allocated towards interest and thereafter any balance in respect of principal. This principle regarding the utilization of a payment which is made in respect of principal and interest has in no way been interfered with by any provision in the Madras Agriculturitists' Relief Act.

In part payment of a money decree a payment was made in September, 1937. It was not a certified payment nor was any part satisfaction recorded. In the receipt given by the decree-holder he acknowledged the payment as part payment in respect of the decree-debt and agreed to exonerate the 3rd defendant alone from his liability in respect of the said decree. On the question whether the payment should be considered as an open payment which being unappropriated by the creditor before 1st October, 1937, shall be credited towards the principal sum owing and not to interest,

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*O.S.A. No. 24 of 1947. 18th November, 1947.

1. (1947) 1 M.L.J. 36.

Held : that it must be inferred that the creditor had appropriated it towards interest.

Appeal against the judgment and order of the Hon'ble Mr. Justice Kunhi Raman dated 13th day of August, 1946, and passed in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 1995 of 1945 in C. S. No. 500 of 1930.

T. R. Arunachalam for Appellant.

M. A. Srinivasan for Respondent.

The Court delivered the following

JUDGMENTS : *Bell, J.*—This is an appeal by the judgment-debtors, defendants 1 and 2 in O. S. No. 500 of 1930 on the Original Side of this High Court against a udgment of Kunhi Raman, J., rejecting their application to scale down the decree debt against them. They sought to apply the provisions of section 8 (1) of the Madras Agriculturists' Relief Act, 1938, which says in effect that all interest on a decree debt outstanding on the 1st October, 1937, shall be deemed to be discharged on that date, when a debt is being scaled down under the provisions of the Act.

The decree in question was passed on the 10th April, 1931, and by consent a sum of Rs. 36,300 together with Rs. 600 for costs was agreed to be due. The judgment-debtors in the years which followed endeavoured to pay off some of their liabilities and paid on one occasion Rs. 15,000, which payment was certified and in respect of which part satisfaction was duly recorded. Later on Rs. 10,000 was paid, and again, the same formalities were complied with. Eventually, execution was taken out by the decree-holder, and realised Rs. 954-14-0 for which also part satisfaction was recorded on 23rd February, 1935. Then, on the 11th September, 1937, a further payment of Rs. 5,400 was made, but under circumstances to which the only guide available is a receipt given by the decree-holder. It was not a certified payment, nor was any part satisfaction recorded. In the receipt, so far as it is relevant, the decree-holder acknowledges payment of "Rs. 5,400 only, being part payment in respect of decree debt in C. S. No. 500 of 1930 . . . . and I agree to exonerate the 3rd defendant . . . . alone from his liability in respect of the said decree."

It is conceded that on that date there was still a sum of some Rs. 15,000 due by the present appellants.

In the application before the learned Judge, the appellants argued that under the provisions of section 8 (1) of the Act in scaling down the debt, regard should be had to this sum of Rs. 5,400 and that it should be considered as an open payment which being unappropriated by the creditor before 1st October, 1937, must be credited towards the principal sum owing and not to interest.

Learned counsel for the appellants appeared to start on what might be termed an auspicious note, because he said that in later execution petitions the decree-holder in asking for relief had not only shown no appropriation made by him in respect of this sum but had ignored it entirely, as though it had never been paid. It was said that no credit whatever had been given for this payment. Had this been true, it would certainly have appeared that it was indeed an unappropriated payment which should be credited towards principal and not towards interest. On examination, however, of this point, it clearly emerged that there was no evidence whatever in support of it and that there is no justification for considering the contention further.

Then, learned counsel relied on the words of the receipt, namely, "being part payment in respect of decree debt in . . . ." He urged that his case was completely covered by *Narayana Holla* v. *Balarama Hande*[1], where in dealing with a preliminary decree in a mortgage suit and on the facts of that particular case

1. (1943) 2 M.L.J. 436.

where certain release deeds had been executed reciting that money had been paid to the decree-holder " out of the amount due under the said decree," it was held that they were payments which should be treated as such payments, remaining available in reduction of the principal after cancellation of interest as on the 1st October, 1937. There, it was held that as the payments had not been recorded by way of satisfaction and as there was no act either on the part of the debtor or on the part of the creditor indicating how the sums paid should be adjusted towards the decree.

> " All that can be said with any certainty is that these payments were made for the specific purpose of reducing the decree. We do not consider that the reference in the release deed to " the balance after deducting the previous payments " can be taken to establish an actual adjustment of the previous payments in reduction of the decree amount, so as to throw the burden upon the debtor of showing an appropriation in the manner most favourable to himself."

Counsel was frank enough to admit that this was the only case of the many under the Madras Agriculturists' Relief Act upon which he could place any great reliance.

It is to be observed that the learned Judges there were dealing with a preliminary mortgage decree where the principal sum and the interest due under the mortgage had become merged in the sum ordered in the preliminary decree to be deposited in Court in the requisite time. There are many considerations which apply to mortgage decrees which do not apply to money decrees. The judgment-debtor in a mortgage suit has many, what may be called, indulgences given to him which are not given to an ordinary judgment-debtor. Nothing in the shape of execution, for example, can be taken without leave of Court and except in certain contingencies.

In a money decree, as in the present case, there is a decree for money and interest, but there is also another part of the decree which decrees that what may be called new interest will become payable if the amount due is not paid. It is that interest which falls to be considered in this case as on 11th September, 1937 when the payment in question was made. Kunhi Raman, J., considered the case above mentioned and also two others, *Ramaswami Aiyar* v. *Ramayya Sastrigal*[1] and *Sreenivasachariar* v. *Bysani Krishnayya*[2] and came to the conclusion that as the latter concerned money decrees and that the debtor as in this case failed to show that he had made any appropriation when paying money, the inference was that the creditor had appropriated the payment primarily towards interest. The learned Judge said that he preferred the two latter cases to the first one, and I agree with him. A further case on exactly the same lines which precedes the two last-men-mentioned is *Venkiteswara Aiyar* v. *Ramaswami Aiyar*[3]. The learned Judges were same in each case. Each case related to matters arising under the Act IV and all substantially to the same effect, the facts of course being somewhat different. In my view, the learned Judge was correct in his conclusions on the facts before him, and nothing that has been said on behalf of the appellants would lead me to disagree in any way from his reasoning. I would dismiss the appeal with costs.

The Chief Justice.—I agree, and desire to add only a few words. The principle of law which always has been observed and recognised is that when a payment is made in respect of principal and interest, there is an inference that the payment is ordinarily first allocated towards interest and thereafter any balance in respect of principal. That was recognised in two decisions under the Madras Agriculturists' Relief Act, 1938, in *Ramaswami Aiyar* v. *Ramayya Sastrigal*[1] and in *Venkiteswara Aiyar* v. *Ramaswami Aiyar*[3]. In my view the recognised and acknowledged principle regarding the utilisation of a payment which is made in respect of principal and interest has in no way been interfered with by any provision in the Madras Agriculturists' Relief Act, 1938.

V.P.S. *Appeal dismissed.*

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1. (1941) 1 M.L.J. 295.
2. (1941) 1 M.L.J. 833.
3. (1941) 1 M.L.J. 9.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Arunachala Goundan and others .. *Appellants.**

Criminal trial—Initiation of trial after 5 P.M. and closing trial and passing sentence at 9 P. M.—Propriety—Legality of proceedings—Criminal Procedure Code (V of 1898)—Sections 412 and 423—Plea of guilty in improper trial before a second class Magistrate—Powers of the appellate Court in appeal—Setting aside of conviction on the ground of trial being improper or irregular—Order for re-trial, if necessary—Effect of not ordering fresh trial.

Except under very abnormal and unusual circumstances, no Court is justified in taking up and proceeding with the trial of a criminal case after the usual Court hours. It may very well be and is proper that a case which has been started during the working hours of the day, may be prolonged after office hours under exceptional conditions but that would not justify a court in initiating a trial or enquiry long after 5 P.M. and continuing the same at a stretch and closing the case and sentencing the accused at 9 P.M.

Where the accused were on a first information report dated 31st March, 1947, arrested in the early hours of the morning of 1st April, 1947, and were taken to the police station and the filing of the charge sheet, the commencement of the trial, the close of the trial and the passing of the sentence were all on the same day (*i.e.*) 1st April, 1947, and extended upto 9 P.M. on that day and the accused were convicted on their own plea of guilty,

Held :That the procedure adopted by the Magistrate was unusual and irregular and the entire proceedings were vitiated. The accused had no fair or proper trial and in the circumstances, the plea of guilty cannot be accepted at its face value.

Under section 412, Criminal Procedure Code as it stands now, where the conviction on a plea of guilty is by a second class Magistrate, it is open to the appellate Court and to the High Court in revision to go into the matter both on facts and law and find out whether the conviction was right or not.

Though the usual procedure to be followed in cases where an accused person has been convicted on a trial which the appellate or revisional Court considers to be unfair, improper or irregular, is to set aside the conviction and order a fresh trial, it need not always be the rule. When a fresh trial is not ordered it amounts to a discharge of the accused.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the orders of the Court of the Sub-Divisional First Class Magistrate, Namakkal, dated 26th May, 1947, and made in C. A. Nos. 27 and 28 of 1947, preferred against the orders of the Court of the Stationary Sub-Magistrate, Namakkal, in C. C. Nos. 645 and 644 of 1947, respectively.

N. Somasundaram and *P. S. Kailasam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—It is more convenient to deal with these cases by one and the same judgment as the facts are, to a large extent, interrelated and four petitioners are common in both. In Crl. R. C. No. 557, the petitioners have been convicted of the offence of assaulting a public servant in the discharge of his duties, an offence punishable under section 353 of the Indian Penal Code and the first petitioner is sentenced to rigorous imprisonment for five months and the others to rigorous imprisonment for four months. In Crl. R. C. No. 558, the 57 petitioners of whom petitioners 1 to 4 are the same as in the previous case, have been convicted of an offence under section 147, Indian Penal Code and sentenced to rigorous imprisonment for four months each. In the case of petitioners who are common to both, the sentences are to run concurrently.

The circumstances under which the petitioners were convicted are rather unusual and peculiar. In Crl. R. C. No. 557, the first information report dated 31st March, 1947, and the charge sheet were filed before the Stationary Sub-Magistrate, Namakkal, on 1st April, 1947, and the petitioners were produced from police custody in the Sub-Magistrate's Court late in the same evening, the trial started after 5 P.M. and ended at about 9 P.M. According to the first information report, the offence took place on 31st March, 1947, at 6 P.M. The arrest of the petitioners

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*Cr.R.C. Nos. 557 and 558 of 1947.
(Crl.R.P. Nos. 453 and 454 of 1947.) 18th February, 1948.

was in the early hours of the morning of 1st April, 1947, at the village of Siviyampalayam and they were taken to the police station at Namakkal immediately thereafter. As is seen from the judgment of the trial Court, the filing of the charge sheet the apprehension of the accused, the commencement of the trial, the close of the trial and the passing of sentence were all on the same day i.e., on 1st April, 1947. According to the same judgment the petitioners pleaded guilty of the offence and were convicted on their own plea.

In revision it is contended that the undue haste and precipitancy with which the entire proceedings were gone through resulted in a serious miscarriage of justice as the accused had no opportunity to defend by availing the assistance of counsel. Therefore, the argument is that the trial was improper and irregular, the plea of guilty was not the result of voluntary volition on their part but that the petitioners were in a very terrified and panic stricken state and did not, in fact, want to plead guilty but claimed to be tried. In Criminal Revision Case No. 558 also, the same grounds are alleged, viz, that the 57 petitioners were taken in a lorry at night to the Nammakkal police station ; that they were all kept under police custody ; that at about 5 P.M. on 1st April, 1947, were made to sit in the open space on the eastern side of the compound of the Magistrate's Court at Namakkal and that they were not allowed to talk to each other being under strict police guard. At about 8-30 P.M. the Magistrate took up the enquiry, examined the few witnesses for the prosecution and recorded the accuseds' plea. On account of the fear and panic in the minds of the petitioners, they could not even collect their thoughts and give coherent answers. The learned counsel further contends that the inquiry after Court hours, without the consent of the petitioners is illegal and irregular and has caused serious prejudice and grave miscarriage of justice.

The learned Sub-Divisional Magistrate, Nammakkal, who heard the appeals in both these cases, states in his judgment that the trial was commenced immediately after the accused were produced before Court at the instance of the prosecution to whom the case was very important and urgent and as such the prosecution were very anxious to get on with the enquiry without any delay. The learned Magistrate, then proceeds to state that the petitioners, evidently had no objection to the course adopted as they did not want further time or ask for any adjournment. Nevertheless it is not stated that the petitioners prayed for the trial to be taken up immediately. Mere silence or acquiescence on the part of the petitioners in those circumstances, has been interpreted by the Magistrate as the consent of the petitioners for holding the trial during these out of Court hours. The learned Magistrate also holds that the petitioners had no time to consult or engage counsel.

In view of the memo filed by the pleader for the petitioners in Criminal Revision Case No. 557 before the lower appellate Court and the affidavit of one Sellappa Goundan, I thought it advisable to call for a report from the trial Court as to what actually happened. But unfortunately the trial Magistrate had been transferred and his successor was not able to state anything personally but submitted a report received by the Magistrate from the Inspector of Police, Nammakkal, about the circumstances attending the arrest of the accused. I have carefully perused the police report as well as the affidavit by the petitioners' relation Sellappa and the memo filed by the petitioners' pleader in the lower Court. It seems to me that the procedure adopted by the trial Magistrate was unusual and irregular. The police report does not definitely state the exact time when the petitioners were produced before the trial Magistrate and what time was taken for the enquiry ; but from the judgment of the lower appellate Court one can infer that the circumstances attending the arrest and the trial are not very different from what is stated by the petitioners' advocate and in the affidavit filed in the lower appellate Court. It may be safely concluded that from the early hours of the morning of the 1st April, 1947, the petitioners in both these cases, were in police custody at the Namakkal police station, that they were produced before the Court after Court hours, the trial commenced thereafter and was closed at about 9 p.m. Granting that the petitioners did not ask for time to engage counsel or protest against the undue haste with which the

proceedings were pushed through, I am unable to hold that the action of the trial Court, is, in any way justified. Courts of Criminal law are expected to function without any semblance of police or prosecution interference and even if, as the learned appellate Magistrate finds, the case was important and urgent to the prosecution, the sub-Magistrate was not within his powers in beginning the trial after Court hours. Whether the accused persons protested or not is not a matter which is material. At any rate, for the purpose of the present case I am prpared to take it that the accused did not ask for time to engage counsel or protest against the hasty manner in which the trial was proceeded with. Even then, it seems to me that the trial should not have been conducted in the early part of the night as has now been done. The offence was a serious one and the accused persons, 57 in number, were all of them villagers arrested the previous night and brought to the police station immediately. Except under very abnormal and unusual circumstances, no Court is justified in taking up and proceeding with the trial of a criminal case after the usual Court hours. Lawyers are not expected to attend Court at such unusual times and parties or witnesses cannot be compelled apart from their express desire, to attend Court out of normal hours. It may very well be and is proper that a case which has been started during the working hours of the day, may be prolonged after office hours under exceptional conditions but that would not justify a Court in initiating a trial or enquiry long after 5 p.m. and continuing the same at a stretch till 9 p.m.

Such being the case, the entire proceedings have been vitiated. The accused have not had a fair or proper trial and in these circumstances the plea of guilty cannot be accepted at its face value. Two questions of law, then, arise on these conclusions and they are, whether the petitioners can go behind their plea of guilty and, if that is to be allowed, a retrial of the cases is necessary at all.

On the first point section 412, Criminal Procedure Code, is the provision of law dealing with it. It runs as follows :

> "Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence."

In the present Code the prohibition against an appeal except as regards the extent or legality of the sentence when an accused is convicted on his own plea of guilty, is restricted to the conviction by a Court of Session, Presidency Magistrate or a Magistrate of the first class. In the Code of 1882, this prohibition was only to a conviction by a Court of Session or a Presidency Magistrate. The words " Magistrate of the first class " were added when the Code was amended in 1898. Therefore the trial Court in the present case being a Magistrate of the second class, an appeal will lie not only on the question of sentence but also on the merits of the case as well. The appellate Court has ample power to go into the evidence and find out whether the proper procedure has been followed and whether the appellants had a fair and proper trial.

I have been able to find out authority also from reported decisions fortifying the above view of mine. In *Queen-Empress* v. *Kalu Dosan*[1], Parsons and Ranade, JJ., have held that where the accused pleaded guilty to an offence before a Magistrate of the first class and was sentenced by him, the Sessions Judge was competent, on appeal by the accused, to deal with the whole appeal both on facts and on law. The section as it stood then, exempted a conviction by a Court of Session or a Presidency Magistrate alone and not by a First Class Magistrate. Therefore there is clear authority for the position that, on the section as it stands now, in the absence of a second class Magistrate beirg included in the category of Courts from which no appeal lies in a case of conviction on a plea cf guilty, it is open to the appellate Court and to this Court in revision to go into the matter both on facts and law and find out whether the conviction was right or not. In *Ali Hussain* v. *Emperor*[2], it has been laid down that the High Court in revision is not

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1. (1896) I.L.R. 22 Bom. 759. 2. A.I.R. 1930 Rang. 349: 128 I.C. 854.

bound by section 412, Criminal Procedure Code, but may examine the record for the purpose of seeing whether the applicants have had a fair trial and whether their plea of guilty was based on a proper conception of the facts.

To the same effect is the decision in *Chunilal Hargovan* v. *Emperor*[1], where Fawcett, J., with whom Madgavkar, J., agreed was of the view that in view of section 412, Criminal Procedure Code, it was open to an accused person to raise the plea that, he had been wrongly convicted, even though he pleaded guilty in the trial Court, at the time when the matter comes up in revision before the High Court. This means that the provisions of section 412 are not applicable in revision and the powers of the High Court are not at all curtailed or circumscribed by this section. The provisions of section 412 have never been considered as forbidding the High Court in revision from exercising just as wide powers as if there had been an appeal and therefore the powers of a High Court in dealing with applications in revision where the accused has pleaded guilty are as ample as if an appeal on the merits had been entertainable. (Vide *Krishnachandra Sinha* v. *Emperor*[2].) As already stated, I do not feel justified in accepting the plea of guilty of the accused circumstanced as they were at the time when the plea was made and recorded.

The next question is whether, after setting aside the orders of the lower Courts a re-trial should be ordered. It is not disputed that the petitioners have already undergone a period of 36 days in prison before they were released on bail. Is it necessary now to order a re-trial ? Mr. N. Somasundaram urges that the interests of justice do not require further trial and the learned Public Prosecutor agrees that it is entirely left to my discretion to order a further trial or not. The usual procedure to be followed in cases where an accused person has been convicted on a trial which the appellate or revisional Court considers to be unfair, improper or irregular, is to set aside the conviction and order a fresh trial. But such need not always be the rule. In *Bhase Singh* v. *Emperor*[3], Sir Edwards Chamier, C.J. and Sharfuddin, J., of the Patna High Court observed as follows :

> "The first order of the Sessions Judge and all subsequent proceedings must be set aside. The only question is whether further proceedings should be permitted. On behalf of the applicants stress is laid down on the fact that they have in various instalments served some thing over a month's rigorous imprisonment under one or other of the convictions recorded against them and we are urged on this account to disallow further proceedings. On behalf of the Crown it is urged that the case is one of some importance and that the applicants should not be acquitted merely on account of the irregularities which have taken place. It is said that there was a serious riot, but apparently no serious injury was done to any one. As already stated these proceedings have been pending since February, 1915. In view of this fact and in view also of the fact that the applicants have been in jail for a considerable period, we think that we ought not to allow further proceedings to take place. We, therefore, allow this application and we set aside the convictions of the appellants and direct that they be released."

This decision was followed in *Girdhari* v. *Emperor*[4] where it is stated that in a case where, as a necessary consequence of setting aside the conviction on the ground that it was void there should be a re-trial, in the special circumstances of a particular case, *viz.*, that the applicant has served out more than half the sentence, the proper thing would be to accept the prayer of the applicant that there should be no re-trial. Mukerji, J., in *Tufail Ahmed* v. *Emperor*[5] in setting aside a conviction on the ground of its being contrary to the provisions of section 239, Criminal Procedure Code, did not order a re-trial. That such procedure is also prevalent in Punjab is seen from *Kundal Lal* v. *Emperor*[6], where Sir Shadi Lal, C.J., after finding that the trial was vitiated by the fact that the accused was not examined under section 342, Criminal Procedure Code, after the prosecution witnesses were recalled for cross-examination, considered it unnecessary to order a re-trial as the accused had already undergone the expense and worry of a trial and it was not desirable to expose him to any further trouble and expenses even though he may be guilty of an offence for which he has to be tried. I am in perfect agreement with the view enunciated

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1. 28 Bom. L.R. 1023: A.I.R. 1927 Bom. 57.
2. A.I.R. 1943 Pat. 313.
3. (1917) 43 I.C. 109.
4. A.I.R. 1930 Nag. 255.
5. A.I.R. 1925 All. 3012.
6. A.I.R. 1934 Lah. 648.

in these pronouncements, even though the result of the setting aside, according to me, amounts only to a discharge.

Looking at the statute itself it is clear that the words of section 423, Criminal Procedure Code, dealing with the powers of an appellate Court are sufficiently wide to cover a case like this. Learned counsel also urges that in section 423 (1) (*b*) the words " reverse the finding and sentence, and acquit or discharge the accused " imply that an appellate Court or a Court of revision can refuse to order a fresh trial and thereby discharge the accused. It seems to me that when, once, an irregular or improper conviction has been set aside as void and a fresh trial is not ordered it amounts to a discharge of the accused.

For the reasons above stated, I am of the view that since nearly a year has elapsed from the date of the alleged offence and also on account of the period of sentence which the petitioners have already undergone it is unnecessary to order fresh trials. These petitions are therefore allowed and the convictions and sentences are set aside.

V.S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Chinnayya Goundan and others *Petitioners.**

Criminal Procedure Code (V of 1898), *section* 195 (1) (*a*)—*Complaint —Necessity—Test—Same facts constituting a general offence which does not require a complaint by a Court or a public servant and a more aggravated particularised form of offence—Indian Penal Code (XLV of* 1860), *sections* 143 and 188—*Defiance of an order under section* 144, *Criminal Procedure Code—Prosecution for an offence under section* 143, *read with section* 188, *Indian Penal Code—Absence of complaint by the public servant who promulgated order under section* 144, *Criminal Procedure Code—Legality of the trial and conviction.*

It is more in consonance with natural justice and equity that where on the same facts a general offence which does not require a complaint by a Court or a public servant is committed along with a more aggravated particularised form of offence, it is not open to the prosecution to circumvent the provisions of section 195, Criminal Procedure Code, by resorting to proceed with the general minor offence without attempting to move the Court or officer concerned for taking action under section 195, Criminal Procedure Code. The Court must consider the facts in the complaint as a whole and if they disclose an offence for which a special complaint is necessary under the provisions of section 195, Criminal Procedure Code, the Court cannot take cognizance of the case at all unless the special complaint has been filed.

Casee-law discussed.

Where certain persons are prosecuteed under section 143, read with section 188, Indian Penal Code, for the defiance of an order passed under section 144, Criminal Procedure Code the real offence committed is one under section 188, Indian Penal Code and the accused cannot be tried for a minor general offence like the one under section 143, Indian Penal Code, without a proper complaint under section 195 (1) (*a*), Criminal Procedure Code, and a trial and conviction without such a complaint would be without jurisdiction.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Sub-Divisional Magistrate, Namakkal, dated 10th January, 1947, in C. A. No. 133 of 1946 (C. C. No. 110 of 1946, Sub-Magistrate, Attur).

N. Somasundaram and *P. Rajamanickam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to revise the appellate order of the Sub-Divisional Magistrate, Namakkal, confirming the conviction and sentence passed on the 25 petitioners herein, of an offence under section 143 read with section 188, Indian Penal Code and the sentence of a fine of Rs. 100 on each of the petitioners.

On the 13th and 14th January, 1946, the Sub-Magistrate of Attur passed orders under section 144, Criminal Procedure Code, restraining all the

* Cr.R.C. No. 284 of 1947. (Cr.R.P. No. 273 of 1947.) 7th January, 1948.

petitioners who belong to one of the factions in the Keeripatti village in Attur taluk from conducting the 'bull play' in connection with the Pongal festival in a village temple. In defiance of this prohibitory order, the petitioners formed themselves into an unlawful assembly and in spite of the warning given by the police officers on the spot, conducted the 'bull play' on the occasion of the festival. For this offence, they were charge-sheeted for being members of an unlawful assembly with the common object of committing an offence, *viz.*, the defiance of the order under section 144, Criminal Procedure Code, which itself is an offence under section 188, Indian Penal Code, tried and convicted and sentenced to the fines above stated. Having failed in their attempt to get the conviction and sentence set aside in appeal, the petitioners now seek to revise the order of the lower appellate Court.

The only substantial point urged in revision is that in the absence of a complaint by the public servant who promulgated the order under section 144, Criminal Procedure Code, no Court could take cognizance of the offence under section 143; because the real offence is one under section 188, Indian Penal Code, for which the necessary pre-requisite is a complaint under section 195 (1) (*a*), Criminal Procedure Code. Both the lower Courts have rejected this contention on the ground that the petitioners have committed two distinct offences, *viz.*, one under section 143, Indian Penal Code, and the other under section 188, Indian Penal Code and it is within the absolute discretion of the prosecution to choose either or both of the offences for the purpose of prosecution. Having chosen to prosecute under section 143, Indian Penal Code giving up as it were the offence under section 188, Indian Penal Code, there is no prohibition on the prosecution from proceeding with the inquiry and trial under section 143, Indian Penal Code, without a complaint as stated above. It is therefore according to the lower Courts, a matter for election for the prosecuting agency and the learned Sub-Divisional Magistrate finds nothing illegal in this.

The authorities on this question are not quite uniform nor easy to reconcile. But the more authoritative and recent decisions of this Court proceed upon a line of reasoning culminating in a conclusion to the effect that in such cases a complaint from the public servant concerned is essential. It is more in consonance with natural justice and equity that where on the same facts a general offence which does not require a complaint by a Court or a public servant is committed along with a more aggravated particularised form of offence, it is not open to the prosecution to circumvent the provisions of section 195, Criminal Procedure Code, by resorting to proceed with the general minor offence without attempting to move the Court or officer concerned for taking action under section 195, Criminal Procedure Code. In *Perianna Muthirian* v. *Vengu Aiyar*[1], Curgenven, J., in dealing with a case where the facts stated in the complaint disclosed an offence under section 193, Indian Penal Code, committed in relation to a proceeding in Court, has laid down that no Court can take cognizance of such an offence otherwise than in the manner prescribed by section 195, Criminal Procedure Code, and it would make no difference that the complaint in order to evade that provision elects to name the offence as one for which no complaint by the Court or public officer was necessary. The specific offence should be given preference over the more general offence. In that case a complaint was filed against two individuals for the alleged offence of abetment of forgery in relation to a document filed before a Court where proceedings under section 145, Criminal Procedure Code, were pending; and even before the culmination of such proceedings, a complaint was filed alleging the abetment of forgery against two persons. This complaint was rejected on the ground that it was not instituted by the Court in which the document was produced in relation to the proceeding pending therein. On revision Curgenven, J., held that though it was sought to be made out by the complainant therein, that the persons who were alleged to have abetted the offence of forgery should be

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1. (1928) 56 M.L.J. 208.

proceeded against under section 465 read with section 109, Indian Penal Code, still it was not open to the party to evade the specific offence of fabricating false evidence in relation to a judicial proceeding by giving preference to the more general offence of forgery. The reasoning of the learned Judge, with which I respectfully agree, is that the gravamen of the charge was the fabrication of false evidence in relation to a judicial proceeding and therefore the complainant ought not to be permitted to circumvent the provisions of section 195, Criminal Procedure Code, by putting forward a general offence of forgery. A similar case is the one in *Ravanappa Reddi* v. *Emperor*[1], where Jackson and Curgenven, JJ., held that where a complaint was filed against the accused by a private complainant alleging that the accused had fabricated a promissory note on which a suit was filed against the complainant, and a fraudulent decree obtained, the Court when confronted with a complaint like this by a private person, must refuse to take cognizance of it and could not even examine the complainant on oath. The principle underlying this decision is again the same as on which Curgenven, J., proceeded in *Perianna Muthirian* v. *Vengu Aiyar*[2]. A Division Bench consisting of Madhavan Nair and Burn, JJ., in *Appadurai Nainar* v. *Sampath Rao Nainar*[3] have remarked that parties should not be allowed to evade the provisions of section 195, Criminal Procedure Code, by filing a complaint under another provision of the Penal Code if clearly an offence for which a prior complaint by the Court or the public officer is necessary, has been committed relying upon the decision in *Ravanappa Reddi* v. *Emperor*[1]. The circumstances under which the decision of the learned Judges was passed were that a suit was brought in a village panchayat Court on a promissory note where it was found that the document was a forged one and that the promisee had forged it along with other persons who were the scribe and attesting witnesses to the document. As a result of this, the defendant filed a complaint against the plaintiff in the suit as well as the scribe and the attestors, and it was then, that the learned Judges held that as the prosecution was clearly under section 467, Indian Penal Code, the complaint could not be proceeded with unless the Court before which the offence was revealed files a complaint as required under section 195, Criminal Procedure Code. There was the additional circumstance that in this case an anomalous situation had come into being because the Criminal Procedure Code was not applicable to the Village Courts under section 77 of the Village Courts Act, and even so, the learned Judges held that a private complainant cannot initiate proceedings. This decision is very strong authority establishing that in all cases where the offence complained against requires a previous complaint under section 195, Criminal Procedure Code, no prosecution can be instituted even where the provisions of section 195, Criminal Procedure Code, are not applicable to the public officer before whom the offence is committed. The principle deducible from these cases is that when a complaint is made to a Court the facts should be considered as a whole and there should be no splitting up of the facts. Therefore, the Court is not entitled to disregard some of the facts and try an accused person for an offence which the remaining facts disclose. Considering the facts as a whole if they disclose an offence for which a special complaint is necessary under the provisions of section 195, Criminal Procedure Code a Court cannot take cognizance of the case at all unless that special complaint has been filed. The most recent case on the subject is that of my learned brother Happell, J., in *Antarvedi Sarma* v. *Emperor*[4], where the previous cases have been exhaustively analysed and discussed and my learned brother following the decision in *Ravanappa Reddi* v. *Emperor*[1], and *Appadurai Nainor* v. *Sampath RaoNainar*[3] held that where the facts disclosed an offence under sections 193 and 471, Indian Penal Code, the complainant could not be allowed to evade the provisions of section 195, Criminal Procedure Code, by filing a complaint under section 467, Indian Penal Code alone. The decision of Lakshmana Rao, J.,

1. (1931) 62 M.L.J. 735 : I.L.R. 55 Mad. 343.
2. (1928) 56 M.L.J. 208.
3. (1935) 69 M.L.J. 812 : I.L.R. 59 Mad. 165.
4. (1946) 1 M.L.J. 466.
5. (1940) 2 M.L.J. 1063.

in *Gurusami Chetti* v. *Emperor*[5], was considered and distinguished. What is applicable to private parties is equally applicable in the case of a prosecution initiated by the police also. If a private party cannot be allowed to evade the provisions of section 195, Criminal Procedure Code, by filing a complaint under a provision of the Indian Penal Code for which no previous complaint under section 195, Criminal Procedure Code, is necessary *a fortiori* the Crown also cannot be allowed to do so.

This line of authority is binding on me and I respectfully agree with those decisions. As against this, the learned Public Prosecutor relied upon the observations of Miller, J., in *Krishna Pillai* v. *Krishna Konan*[1]. I do not think that the facts of that case are in any way similar to the facts to be considered herein and moreover that decision and the dictum of Miller, J., had been the subject of comment and criticism in later cases. Curgenven, J., in *Perianna Muthirian* v. *Vengu Aiyar*[2], has distinguished the ruling in *Krishna Pillai* v. *Krishna Konan*[1], on the ground that whatever might be the merits of the doctrine enunciated therein, where the Court in respect of which the offence was committed had not been moved to file a complaint it is not open to the party to invoke some other provision of the law for which no special complaint under section 195, Criminal Procedure Code, is necessary. The reasoning applies with equal force to the present case also. The Magistrate who promulgated the order under section 144, Criminal Procedure Code, had not been moved to file a complaint before the police charge-sheet was filed. It is evident that the facts necessary to constitute the offence under sections 355 and 323, Indian Penal Code, are in very many respects different from those necessary to justify an offence under section 183 or 186, Indian Penal Code. The other decision to which reference was made as being opposed to the line of authority requiring the previous complaint is a decision of Sir Lionel Leach, C.J., and Chandrasekhara Aiyar, J., in *Nallappa Goundan* v. *Chinnammal*[3]. That was a case where the complainant was defamed by a person using defamatory words while giving evidence in Court. Under such circumstances the learned Chief Justice held that a complaint of Court under section 195 (1) (*b*), Criminal Procedure Code, was not necessary to prosecute a person for defamation under section 500, Indian Penal Code, in respect of a statement made by him in the witness box.

The provisions of section 195, Criminal Procedure Code, do not apply to defamation and there have been previous decisions of this Court to the effect that a person who is defamed by a witness, when in the witness box, is at liberty to file a complaint against his defamer under the provisions of the Indian Penal Code and such a right existing in him can only be taken away by an express statutory provision to the contrary. This decision does not run counter to the reasonings in the cases above cited. Lastly the learned Public Prosecutor invited my attention to a decision of the Patna High Court in *Sheo Ahir* v. *Emperor*[4]. Muhamad Noor J., in delivering the judgment of the Bench has observed that if in the course of one transaction a number of offences are committed some requiring sanction for prosecution of some authority or the other and others not requiring such sanction, it is not necessary that the prosecution of those offences which do not require such sanction should depend upon the obtaining of the sanction for prosecution for those offences which require such sanction. The law requires that for the prosecution of a particular offence sanction of the Court should be obtained ; but it does not say that if in the course of the commission of an offence which requires sanction for prosecution other offences are committed the magistracy or police are helpless in proceeding to prosecute the offender for those latter offences unless the Court sanctions the prosecution of the former. It has to be observed that this decision is at variance with the line of cases of this Court which I have discussed above, and in addition, there is the circumstance, that in the Patna case, during the course

1. (1907) 17 M.L.J. 559 : I.L.R. 31 Mad. Mad. 43
2. (1928) 56 M.L.J. 208.
3. (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158.
4. (1938) I.L.R. 17 Pat. 680.

of one transaction separate and specific offences were committed and that by itself is sufficient to justify the observations of the learned Judge. In the present revision the ingredient for the offence of unlawful assembly is the common object of committing an offence, and that is the disobedience of the order under section 144, Criminal Procedure Code. Again the formation of the unlawful assembly is only one of the items or ingredients constituting the offence brought into existence by the disobedience of the order. It seems to me therefore that it is impossible to hold that specific or separate offences have been committed by the petitioners. The substantive offence committed by the petitioners is that they knowing that a legal order has been promulgated have disobeyed that order, and thereby they are guilty under section 188, Indian Penal Code. I do not for a moment suggest that if after forming themselves into an unlawful assembly with the common object of disobeying that order and having disobeyed that order, the petitioners again commit some other offence, *e.g.*, if they cause grievous hurt or any other offence, they cannot be tried for that offence without a previous complaint. The reason is that the elements which constitute the offence of grievous hurt or other offences against person or property are quite different from those constituting the offence under section 188, Indian Penal Code.

As I have already mentioned that the real offence committed in this case is one under section 188, Indian Penal Code, the petitioners cannot be tried for a minor general offence like the one under section 143, Indian Penal Code, without a proper complaint under section 195, Criminal Procedure Code. Such being the case the conviction and sentence of the petitioners are without jurisdiction and they are therefore acquitted.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The Public Prosecutor .. *Appellant**

v.

Jeevarathnam and others ... *Respondents.*

Criminal Procedure Code (V of 1898), *section* 428—*Additional evidence of cases in which admissible—Defence of India Rules, Rr.* 84 *(iv) & (vi)—French Establishments in India (Application of Laws) Order,* 1941, *clause* 3—*Export of cloth from a French port in India—Offence, punishable under rule* 84 *(vi),—Defence of India Rules.*

The language of secton 428, Criminal Procedure Code, seems to indicate cases where there being already evidence on record the Court considers it unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. Where formal proof of a document is the only thing necessary the appellate Court would be perfectly justified in admitting the additional evidence.

According to clause 3 of the French Establishments in India (Application of Laws), Order, 1941, all the Indian laws for the time being in force in British India which are relatable directly or indirectly to the imposition and enforcement of prohibitions or restrictions on the import or export of goods etc. are applicable *mutatis mutandis* to French possessions like Karaikkal. Hence, where cloth is exported from Karaikkal to Jaffna there is a contravention of the provisions of rule 84 *(iv)* of the Defence of India Rules and the persons found so exporting are guilty of an offence punishable under rule 84 *(vi)* of the Defence of India Rules.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (Accused) by the Sessions Judge of East Tanjore in Criminal Appeal No. 39 of 1946 on his file preferred against the order of the Court of the Additional 1st Class Magistrate, Negapatam, in C.C. No. 48 of 1946.

The Public Prosecutor (*V. L. Ethiraj*) for Appellant.

V. Rajagopalachari and *K. N. Srinivasan* for Respondent.

The Court delivered the following

*Crl. App. No. 699 of 1946. 20th January, 1948.

JUDGMENT.—The Public Prosecutor, Madras, appeals against the acquittal of the respondents by the learned Sessions Judge of East Tanjore in Criminal Appeal No. 39 of 1946 on his file. The respondents had been convicted by the Additional First Class Magistrate, Negapatam, of an offence punishable under rule 84 (*vi*) of the Defence of India Rules in that they contravened the provisions of rule 84 (*iv*) of the same enactment. On appeal, the learned Judge holding that the Customs Union agreement between the Government of India and the Governor-General of the French Establishments in India has not been proved properly, concluded that the respondents were entitled to acquittal and accordingly directed the same.

So far as the facts are concerned, there is no complication. On the 10th October, 1945, at about 8-30 P.M., when the respondents were carrying by sea bundles of piecegoods in a catamaran bound for Jaffna, a party of Customs officials including P.Ws. 1 and 2 sighted the craft some distance east of the Kodikkarai lighthouse, chased the catamaran and seized the goods. According to the prosecution the respondents were exporting cloth from India in contravention of the Government of India Notification No. 91 CW 1/44, dated the 26th August, 1944.

Two points were raised on behalf of the respondents in their appeal before the learned Sessions Judge. The first of them was that the catamaran was not within the Indian territorial waters and therefore the trial Court at Negapatam had no jurisdiction to entertain the complaint. The learned Judge found that it was not proved that the catamaran was within the territorial waters of British India and so held that the sailing craft was intercepted and seized only on the high seas. On this finding, according to the learned Judge, if the matter had stood there, the Court which tried the respondents had no jurisdiction to do so.

The second question was that if the export had been from any place in India within the jurisdiction of that Court, the trial and conviction are correct. On the evidence it is clearly proved—and there is no doubt about it—that the respondents were taking these eleven bundles of cloth from Karaikkal to Jaffna. Karaikkal is a portion of the French Republic Settlements in India and unless it is proved that this place comes within the term ' British India ' for the purpose of export, it cannot be held that any offence has been committed. In order to substantiate the case that the trial Court had jurisdiction, the prosecution relied upon certain documents some of which according to the learned Judge, had not been properly proved. The crucial document in the case was the Customs Union Agreement entered into between the Governor of French Establishments in British India and His Brittanic Majesty's Consul General in the said establishments acting on behalf of the Governor-General of the Government of India. The lower appellate Court states that P.W. 4 filed an extract which was marked as Ex. P-7 in the trial Court. Before the learned Sessions Judge a typed copy which does not contain or mention the signatures was produced purporting to have been made at Pondicherry and there was no evidence to prove the same under section 78 (6) of the Evidence Act. Holding that the Customs Union Agreement has not been proved, as stated already, the learned Judge acquitted the respondents.

The learned Public Prosecutor has before me filed Cr. M.P. No. 57 of 1948 supported by an affidavit sworn to by the Assistant to the Collector of Central Excise, Madras, praying that the printed copy of the Customs Union Agreement mentioned above containing both the English and the French versions and printed by the French Government in Pondicherry may be admitted as additional evidence in appeal. There is a further prayer that Notification No. 25, dated 13th February, 1941, in the *Gazette of India* dated 15th February, 1941, called the French Establishments in India (Application of Laws) Order, 1941, should also be admitted. It has to be decided whether this appliction should be granted. At the hearing of the appeal by my Order dated 9th January, 1948, I admitted these documents as additional evidence for the reasons stated in this judgment. Section 428, Criminal Procedure Code, lays down that, in any appeal, the appellate Court, if it thinks additional evidence to be necessary shall take such evidence either by itself or by

a Court subordinate to it. In *M. P. Narayana Menon In re*[1], Odgers, J., dealing with the powers of the appellate Court to take additional evidence observes that the word 'necessary' in section 428, Criminal Procedure Code, does not import that it is otherwise impossible to pronounce judgment without the additional evidence. There is no restriction in the wording of the section either as regards the nature of the evidence or that it has to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof alone is necessary. This case is clear authority for the position that where formal proof of a document is the only thing necessary, the appellate Court is perfectly justified in admitting additional evidence. In *Jeremiah* v. *Vas*[2], Sundara Iyer, J., was of the opinion that additional evidence under section 428, Criminal Procedure Code, can be ordered to be taken only if the appellate Court thinks it necessary. The language seems to indicate cases where there being already evidence on record, the Court considers it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. There is another decision of this Court in one *Varadarajulu Naidu* v. *King Emperor*[3], where Wallis C.J., was of the view that the failure to prove the sanction of the Provincial Government for a prosecution under section 124-A, Indian Penal Code, can be rectified in the appellate Court by admitting additional evidence to supply the defect in formal proof of the sanction. I feel that the authorities above cited justify my allowing the Public Prosecutor's application. The learned Sessions Judge should have remedied this lacuna in formal proof by directing the Public Prosecutor in his Court to produce the copy of the *Gazette of India* as well as the printed record of the Customs Union Agreement proved by the affidavit of the Assistant to the Collector of Central Excise in his Court, especially in view of the circumstance that no objection was taken regarding he absence of formal proof of these matters in the trial Court, I think it was eminently a fit case for the learned Sessions Judge himself to have directed the prosecution to supply the defect by proper proof.

The result of having admitted these documents as additional evidence in appeal by me is that it follows from clause 3, French Establishments in India (Application of Laws) Order, 1941, that all the Indian Laws for the time being in force in British India which are relatable directly or indirectly to the imposition and enforcement of prohibitions or restrictions on the import or export of the goods, etc., are applicable *mutatis mutandis* to Karaikkal. It is abundantly clear that the port of Karaikkal shall be deemed to be a part of British India to which the Defence of India Rules regarding the restriction of export of goods are applicable and this Port being situate in the East Tanjore District is within the territorial jurisdiction of the Additional First Class Magistrate, Negapatam. Mr. Rajagopalachari suggested to-day that the Government of India have not appointed the Additional First Class Magistrate as the Court which should take cognizance of this offence. This objection was raised only just as I was about to deliver judgment. Nothing has been brought to my notice to justify the upholding of the objection especially since no objection had ever been taken to the territorial jurisdiction of the Court till now. I therefore over-rule the objection.

The lower appellate Court has not discussed the prosecution and defence evidence in the case and decided the appeal on the merits and therefore the ordinary course which I would have adopted would be to remand the appeal for fresh hearing. Both the Public Prosecutor and Mr. V. Rajagopalachari the learned counsel for the respondents have requested me that it is unnecessary to remand the appeal and that I may, myself, give a decision on the merits of the case. There is the clear evidence of P.Ws. 1 and 2 that the catamaran containing M.O. 1 series, 11 bundles of cloth, was seized by them and a mahazar was prepared. That the respondents were on that catamaran in the sea proceeding to Jaffna is not

1. A.I.R. 1925 Mad. 106.
2. (1911) 22 M.L.J. 73 : I.L.R. 36 Mad.
3. (1919) 37 M.L.J. 81 : I.L.R. 42 Mad 885.

disputed. Having gone through the evidence of P.Ws. 1 and 2, I see no reason not to accept and act upon the same. The witnesses examined for the defence do not in any way lessen the effect of the prosecution evidence because even D.W. 3 states that it was the first respondent that arranged for the carriage of the 11 bundles of cloth from a certain street in Karaikkal to the sea Coast for being loaded in the catamaran. In fact Mr. Rajagopalachari for the respondents did not dispute the fact that the bundles of cloth were loaded in the catamaran from Karaikkal. In these circumstances, the accused have committed an act prohibited by rule 84 (*iv*) of the Defence of India Rules punishable under rule 84 (*vi*) of the same rules. The appeal is therefore allowed and the respondents are convicted of an offence under rule 84 (*vi*) of the Defence of India Rules. But in view of the fact that the occurrence took place more than two years ago I do not consider it necessary that the respondents should be sentenced to any terms of imprisonment. The first respondent who is in fact responsible for the crime is sentenced to pay a fine of Rs. 1,000 or in default to undergo rigorous imprisonment for one year. The other respondents are sentenced to pay a fine of Rs. 50 each or in default to undergo rigorous imprisonment for 15 days each. The order of the learned Sessions Judge setting aside the confiscation of the bundles of cloth will stand.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. SATYANARAYANA RAO.

Vannappan Servai .. *Petitioner**

v.

Sinnathayee Ammal and others .. *Respondents.*

Court-Fees Act (VII of 1870 as amended), section 7 (iv-A)—Applicability—Suit for declaring will of deceased to be invalid—Court-fee payable—Will whether secures money or other property.

A will is merely a declaration of the intentions of the testator with respect to his property to take effect after his death and is not a document " securing money or other property" within the meaning of section 7 (IV-A) of the Court-Fees Act as amended in Madras. Consequently, a person suing for a declaration that the will of the deceased was not true in fact and was at any rate invalid in law is not bound to pay Court-fee under section 7 (IV-A) on the market value of the properties forming the subject-matter of the will.

Kattiya Pillai v. *Ramaswamia Pillai*, (1929) 56 M.L.J. 394 and *Chief Inspector of Stamps* v. *Ramesh Chandra*, I.L.R. (1944) All. 133, relied on.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Madura in O.S. No. 33 of 1946, dated 27th July, 1946.

The Court delivered the following

JUDGMENT.—The plaintiff who is the petitioner before me instituted the suit out of which this petition arises for declarations that the wills purported to have been executed by the deceased Periakaruppan Servai on 29th October, 1944, and 30th January, 1945, respctively were not true in fact and at any rate invalid in law, and in respect of these two declarations he paid a fixed Court-fee of Rs. 100 for each declaration. On an objection raised by the defendants, the learned Subordinate Judge framed issue (3) raising the question " whether the court-fee paid is correct." He took this issue for trial as preliminary issue and held that the two reliefs fall under section 7 (*iv-A*) of the Court-Fees Act. According to the learned Judge, the reliefs in substance are for cancellation of the two wills and that therefore the plaintiff is bound to pay Court-fee on the market value of the properties forming the subject-matter of the wills.

In my opinion, the learned Judge has overlooked the clear provisions of section 7 (*iv-A*) of the Court-Fees Act. The relevant part of the section is that the

* C. R. P. No. 815 of 1946. 28th November, 1947.

document must be a document "securing money or other property having money value." A will is merely a declaration of the intentions of the testator with respect to his property to take effect after his death and is not a document "securing money or property" within the meaning of the section. This is the view taken by a Bench of this Court in *Kattiya Pillai* v. *Ramaswamia Pillai*[1], where the learned Judges thought that the question was not arguable at all; for they said that "the will sought to be cancelled is clearly not a document securing money or property having money value". Under the corresponding provision of the Court-Fees Act the Allahabad High Court in a recent decision in *Chief Inspector of Stamps* v. *Ramesh Chandra*[2], has taken a similar view. At page 138 the learned Judges observed :

> "The question therefore, is whether a will can possibly be described as an instrument 'securing money or other property' within the meaning of this section. In our judgment, the question is only to be stated in order to be aswered in the negative. 'Will' as defined by the Indian Succession Act means 'the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.' It is clear, therefore, that a will is no more than the declaration of an intention and it canot possibly be described as an instrument securing any property."

I respectfully agree with this view of the language of the section.

The result is that the revision petition is allowed, and the order of the learned Judge is set aside. The respondents will pay the costs.

The lower Court will hold an enquiry as regards the jurisdictional value o the suit; for if the value exceeds Rs. 10,000 or upwards the court-fee for declaration will be Rs. 500 and not Rs. 100 under the Court-Fees Act. My judgment does not at all affect this question and is confined only to the applicability of section 7 (*iv-A*) of the Court-Fees Act.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Mohammed Haji Gani ... *Petitioner**

v.

A. Mohsin Raja .. *Respondent.*

Presidency Small Cause Courts Act (XV of 1882), section 41 and Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7—Suit under section 41 of the Presidency Small Cause Courts Act for ejectment of sub-tenant who had been let into possession before the commencement of the Madras Buildings (Lease and Rent) Control Act—Maintainability.

A tenant sub-let before the commencement of the Madras Buildings (Lease and Rent Control) Act, a godown attached to the premises let to him. The landlord terminated the tenancy and filed a suit under section 41 of the Presidency Small Cause Courts Act against the sub-tenant for his ejectment. On a question as to the maintainability of the suit,

Held, under the circumstances as the landlord could not be evicted under the provisions of the Madras Buildings (Lease and Rent Control) Act and his possession through the sub-tenant could not be disturbed, the sub-tenant himself could not be evicted by the landlord and the suit for his ejectment would not be maintainable.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Small Causes, Madras, dated 5th July, 1947, in Ejectment M.P. No. 1548 of 1947.

S. Azizuddin and *S. Mohiuddin* for Petitioner.

P. Srinivasa Ayyangar for Respondent.

The Court delivered the following

JUDGMENT.—The question in this Civil Revision Petition is whether the respondent was entitled to maintain a suit for the ejectment of the petitioner under section 41 of the Presidency Small Cause Courts Act, in view of the provisions

1. (1929) 56 M.L.J. 394. 2. I.L.R. 1944 All. 133.

* C. R. P. No. 1095 of 1947. 16th January, 1948.

of the Madras Buildings (Lease and Rent Control) Act of 1946 (Madras Act XV of 1946). The respondent had let No. 5, Anderson Street, George Town, Madras, to one M.S. Moosa Sait, and Moosa Sait had sublet a godown attached to No. 5, Anderson Street to the petitioner. Before the application was made under section 41 of the Presidency Small Cause Courts Act the respondent had sent a notice to Moosa Sait terminating his tenancy. The learned Small Cause Court Judge held that section 41 of the Presidency Small Cause Courts Act was applicable to a sub-tenant, and in support of his conclusion referred to the case of *Suryanarayana* v. *Narasimha*[1] and he held also that although Moosa Sait himself might have resisted the action by virtue of Madras Act XV of 1946, his sub-tenant, the petitioner, could not do so as he was not a tenant within the meaning of the Act and Moosa Sait was not himself in possession oft he property. He, therefore, decreed the suit. In *Suryanarayana* v. *Narasimha*[1], the tenant was made a party to the suit as the first defendant. He did not contest the suit and he had vacated the premises in his occupation. If the position of Moosa Sait was the same as the position of the tenant in the Bombay case there can be no doubt that a decree in ejectment could have been properly passed against the petitioner under section 41 of the Presidency Small Cause Courts Act. His petition, however, is not the same. He was not made a party to the suit, and there is no reason to believe that, if he had been made a party, he would have consented to a decree against the petitioner. It is argued for the petitioner that the suit under section 41 of the Small Cause Courts Act against the petitioner alone is merely an attempt to evade the provisions of the Madras Buildings (Lease and Rent Control) Act since, by virtue of the provisions of section 7 of that Act Moosa Sait remains in possession even though his tenancy has been terminated. Section 7 (1) of Madras Act XV of 1946 enacts that

> " A tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section."

None of the provisions which follow would entitle the respondent to evict Moosa Sait and the only provision that has any relevance to the facts of this case is clause (*ii*) (*a*) of sub-section (2) of section 7 which provides that a tenant within the meaning of the Act may be evicted if he has transferred his right under the lease or sub-let the entire building or any portion thereof after the commencement of the Act without the written consent of the landlord. In the present case it is not disputed that the petitioner was let into possession by Moosa Sait before the commencement of the Act. It is argued by learned counsel for the respondent that the provisions of section 7 do not help the petitioner because Moosa Sait is not in physical possession and there can be no question of evicting him. There seems to me no substance in this contention. Section 7 provides among other things that a tenant can be evicted if he lets in a sub-tenant after the commencement of the Act without the written consent of the landlord. By implication, therefore, he cannot be evicted merely because he has let a sub-tenant into possession before the commencement of the Act; and, notwithstanding the fact that his tenancy has been terminated, his possession through the sub-tenant cannot be disturbed. The view expressed by the learned Small Cause Court Judge that Moosa Sait could have himself resisted the action is, therefore, in my judgment, correct; but he does not seem to me to have drawn the proper inference from it. If Moosa Sait is entitled to remain in possession through his sub-tenant, the sub-tenant himself cannot be evicted by the landlord. A landlord can only maintain a suit for eviction of a sub-tenant if he is himself entitled to immediate possession, which, in the present case he is not, or if he is seeking to recover possession on behalf of the tenant which, in the present case, he does not pretend to be doing.

The civil revision petition is, therefore, allowed with costs.

V.S. *Petition allowed.*

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1. (1925) I.L.R. 49 Bom. 685.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

V. Vr. Bank by Managing Partner Valliappa Chettiar .. *Appellant**

v.

L. M. Bank, Cusba Kangayam by Managing Partner Muthayya Chettiar by Agent Srinivasa Raghava Ayyangar .. *Respondent.*

Pleadings—Amendment—Plaint praying for partition and separate possession of property—Dismissal for reason that agreement conferring right was unregistered—Appeal—Monies realised during pendency—Right to claim share belonging to plaintiff—Amendment of plaint.

The appellant purchased from the Official Receiver the insolvent's rights in two mortgages, one of which was a simple mortgage and the other a usufructuary mortgage. About two years after the sale the appellant entered into an unregistered agreement with the predecessors-in-title of the respondent, who were simple creditors of the insolvent whereby the appellant was to have a three-fourth share and the respondent's predecessors-in-title, an one-fourth share in the rights to the amounts of the said deeds and to the property. Relying on the agreement the respondent filed the present suit for partition and separate possession of the property which was the subject-matter of the agreement and for an account of the mesne profits. The trial Court held that as the agreement was not registered and as there was no evidence of any prior agreement the suit was liable to be dismissed. Thereupon an appeal was preferred and during its pendency the amounts due under the mortgages had been realised. Thereupon the plaintiff-respondent filed a petition for amendment of the plaint and claimed a share of the sum realised in respect of the mortgage. The appellate Judge allowed the amendment holding that although no rights to the security could be conferred by the unregistered document, a right to the debts could.

Held, that the plaintiff was in any event entitled to a share of the money realised and that the amendment of the plaint was rightly allowed by the lower Court.

Appeal against the order of the Subordinate Judge's Court of Coimbatore (Additional) in A.S. No. 179 of 1946, dated the 28th August, 1946, preferred against the decree of the Court of the District Munsiff of Dharapuram in O.S. No. 184 of 1943.

N. C. Vijayaraghavachari and *N. C. Srinivasan* for Appellant.

K. R. Rangaswami Aiyangar and *V. V. Raghavan* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant purchased from the Official Receiver the insolvent's right in two mortgages, one of which was a simple mortgage and the other a usufructuary mortgage. About two years after the sale, the appellant entered into an agreement (Ex. P-10) with the predecessors-in-title of the respondent, who were simple creditors of the insolvent, whereby the appellant was to have a ¾ share and the respondent's predecessors-in-title a ¼ share in the rights to the amounts of the said deeds and to the property. Relying on this agreement, the respondent filed the present suit for partition and separate possession of the property which was the subject-matter of the agreement and for an account of the mesne profits. Faced with the difficulty arising out of the circumstance that Ex. P-10 was not registered, he put forward an oral agreement prior to Ex. P-10, of which Ex. P-10 was said to be merely a record. The trial Court found that there was no evidence of any prior agreement; and since Ex. P-10, which purported to convey the interest in the amounts, was not registered, he dismissed the suit. In appeal, the respondent drew a distinction between his rights to the security and his rights to the debts. By that time, the amounts due under the mortgages had been realised. Thereupon, the plaintiff filed a petition for the amendment of his plaint, claiming a share of the sum realised. Since at first the appellant denied having received any money, he also prayed for permission to sue for an assignment in his favour of the ¼ share in the mortgage deed. The learned Subordinate Judge in appeal referred to *Lakshmana Naicker* v. *Jayaram Naicker*[1], in which the learned Judges drew a distinction between a security and a debt and said that although no rights to the security could be conferred by an unregistered document,

* A. A. O. No. 453 of 1946. 4th February, 1948.

1. (1933) 66 M.L.J. 380.

a right to the debts could. He therefore allowed the amendment and remanded the suit for fresh disposal on the amended plaint.

The learned advocate for the appellant sought to distinguish *Lakshmana Naicker* v. *Jayaram Naicker*[1] on the ground that it relates to a simple mortgage and not, as in the present case, to a usufructuary mortgage. He contends that in a usufructuary mortgage, apart from the security, there is no debt at all to be transferred. For that purpose, he relied on the decision of the Federal Court in *Mt. Parkash Kuar* v. *Mt. Udham Kuar*[2]. The learned Judges there did not, however, draw a broad distinction between a usufructuary mortgage and a simple mortgage. They merely distinguished the cases of simple mortgages such as were dealt with in *Lakshmana Naicker* v. *Jayaram Naicker*[1], from the particular mortgage with which they were dealing, which was of a form common to agricultural land in the Punjab, where the mortgagee has merely a right to receive the rents and profits from the property till the mortgage money has been repaid. In such cases, he has no right to recover the amount of the mortgage money and so there can be no debt. At the time of his death, which was the point of time with which the learned Judges were concerned, the interest he had as the owner of the land was only that of a mortgagee in possession entitled to receive the rents and profits from the property, which was a right in or over agricultural land comprised within Entry 21 of List II and not therefore regulated by the Hindu Women's Rights to Property Act; so that the plaintiff could not claim a share in it.

As the mortgage deed is not now before us, we have no idea of the terms of the deed and so cannot say that there exists no debt independent of the security. There might have been for aught we know a covenant to pay. Moreover, the terms of Ex. P-10 are wide enough to include the money realised by the appellant in the future; and so even if the plaintiff had no right to a transfer of the debt, he would still be entitled to a share of the money realised by the appellant.

The lower Court was therefore justified in allowing the amendment.

It has been pointed out that the learned Subordinate Judge has not said in so many words that the defendant can file a fresh written statement and raise objections to the grant of a decree on the amended plaint. It is fairly clear from the order made by the learned Subordinate Judge that he did not intend to preclude the filing of an additional written statement; but to avoid doubt it is expressly stated here that the appellant has such a right. The amended plaint, as already stated, purports to deal with a situation in which it was not quite clear whether the money had been realised or not; and so the plaintiff prayed to be allowed to ask for specific performance. That is now unnecessary in view of the appellant's admission that he has realised the money. The plaintiff will therefore be permitted to amend his plaint so as to pray for his ¼th share in the money realised on the usufructuary mortgage, with consequential reliefs.

In other respects, the appeal is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Chivatapu Lakshminarayana .. *Appellant**

v.

Maddirala Subbayya and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927, as amended), section 18, Explanation—Scheme found to be unworkable—Appointment of interim trustee superseding scheme—Permissibility.

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1. (1933) 66 M.L.J. 380.
2. (1946) F.L.J. 110: (1947) 1 M.L.J. 127 (F.C.).

* S. A. No. 1017 of 1946. 6th February, 1948.

The general powers of superintendence referred to in the Explanation to section 18 of the Madras Hindu Religious Endowments Act are presumably those referred to in the first sub-section which confers on the Board the general superintendence of all religious endowments within the territorial jurisdiction of the Board. If the contingency contemplated by the Explanation is one that occurs in the working out of the scheme, then the Board is not empowered to pass any orders not in consonance with the scheme; but where the scheme is found to be unworkable the Board can appoint an interim trustee temporarily abrogating the scheme, and invest in him the entire management of the institution.

Appeal against the decree of the District Court of West Godavari at Ellore, in A. S. No. 186 of 1945, preferred against the decree of the Court of the District Munsiff of Tanuku, in O. S. No. 259 of 1943.

V. Parthasarathi for Appellant.

P. Satyanarayana Raju for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this second appeal arises was one by certain Archakas who had been dismissed from service by the appellant, who was then the interim trustee appointed by the Madras Hindu Religious Endowments Board. The District Munsiff of Tanuku held that there was nothing illegal in the manner in which the enquiry had been conducted and the order passed and he further held that the suit was barred by section 43 of the Madras Hindu Religious Endowments Act. He therefore dismissed the suit. In appeal to the District Judge of West Godavari, it was held that the appointment of the appellant as an interim trustee, ignoring *inter alia* the rights of the hereditary trustee, was *ultra vires*, and that therefore the suit lay. He held that section 43 of the Act did not apply; because the competence of the appellant to act under that section had been rightly challenged. He accordingly allowed the appeal and decreed the suit with costs.

A preliminary objection has been taken that the appeal cannot be heard unless the trustees appointed by an order of the 30th September, 1947, are brought on record in the place of the present appellant who was by that order removed. The appellant appealed to the Hindu Religious Endowments Board against the order of the 30th September; but the appeal has not yet been disposed of.

Two decisions of this Court, i.e., *Sivakasi Viswanathasami Devastanam* v. *Koodalinga Nadan*[1], which was followed by another Bench of this Court in *Ittunan Panikkar* v. *Narayana Bharatikal*[2], were roughly to the effect that if a suit was properly instituted by a particular plaintiff, the suit could continue even though in the meanwhile he had lost the status under which he had filed the suit. It is however unnecessary to consider this question at any length; because the appellant was not impleaded as a trustee of the institution, but personally; and the decree of the lower Court ordered costs to be paid by him.

It appears that the scheme embodied in Ex. P-3, drawn up on 16th June, 1928 was not working satisfactorily, apparently because the hereditary trustee was not co-operating with the associate trustees; and so the Hindu Religious Endowments Board came to the conclusion that some modification of the original scheme was necessary. They therefore appointed the appellant as the interim trustee on 21st April, 1940, by Ex. P-2, pending the final modification of the scheme, which was not effected until 30th September, 1947. There seems to have been an unwarranted and unnecessary delay in modifying the original scheme; but for purposes of this appeal the delay is not material. On the 2nd March, 1941, the appellant dismissed the respondents.

It is obviously necessary where a scheme is found to be unworkable and some modification is necessary, that power should be possessed by the Board to make some interim arrangements pending the drawing up of a more satisfactory scheme. In 1930, the Explanation to section 18 of the Act was added. That Explanation is this :

1. (1927) M.W.N. 743. 2. (1928) M.W.N. 746.

"The general powers of superintendence of the Board shall include the power to pass such interim orders as it deems necessary in the interests of the proper maintenance of a math or temple or the administration of a religious endowment."

The general powers of superintendence referred to in this Explanation are presumably those referred to in the first sub-section which confers on the Board the general superintendence of all religious endowments within the territorial jurisdiction of the Board. It is however argued by the learned Advocate for the respondents that this general superintendence is declared to be, by the section, subject to the provisions of this Act, and of any scheme settled or deemed to be a scheme settled under this Act. If the contingency contemplated by the Explanation of this section is one that occurs in the working out of the scheme, then the Board is not empowered to pass any orders not in accordance with the scheme. But in the present case the scheme was found to be unworkable ; and by the order appointing the appellant as interim trustee that scheme must be deemed to have been temporarily abrogated ; and so the Board could not act in accordance with the terms of the scheme, which it found was unworkable and needed modification. All that was therefore required of the Board in passing this interim order was to see that it should be subject to the provisions of the Act. I have no doubt that the Board acted in accordance with the provisions of the Act, and that this Explanation was added in order to empower the Board to deal with cases of this kind.

There is no reason to think that the Board intended to circumvent the provisions of the Act by ignoring the hereditary trustee permanently, as the order of 30th September, 1947, would show, for the Board in its modified scheme provided for the exercise of the hereditary trustee's rights. It was however apparently impracticable for them to make any provision in the interim order ; because it was on his account that the whole scheme had become unworkable. In this connection the learned advocate for the respondents has relied on the decision in *Hindu Religious Endowments Board* v. *Palani Andi*[1], in which the learned Judges held that the Board had no right to exclude a hereditary trustee even for a short time. In that case the learned Judges were however dealing with an instance fairly common at about the time when the judgment was delivered, of the ignoring the spirit of the Act by the Hindu Religious Endowments Board, retaining the hereditary trustee as a trustee, while at the same time depriving him of most of his powers. The learned Judges were not there considering a *bona fide* interim order passed by the Board in an attempt to secure the proper working of the institution until a suitable permanent arrangement could be made.

The learned advocate for the respondents further argues that even though the Board were empowered to confer upon a single trustee the full powers of a trustee they did not in fact do so by their order, Ex. P-2. It is argued that all that they did was to make arrangements for conducting a certain suit which was then pending. The order ran :

"Whereas the Board is satisfied that the scheme of administration framed by the Board in B. O. No. 305 dated 16th June, 1928, should be modified, and that whereas some interim arrangement should be made for conducting the suit, the Board hereby appoints Sri Chivatam Lakshminarayana as the interim trustee of Sri Ekambaraswaraswami temple at Chivatam village, Tanuku taluk, West Godavari district, pending the modification of the scheme.

The interim trustee shall enter upon his duties forthwith and conduct the pending suit under section 78 of the Act. He should report the progress from time to time."

Before taking action against the respondents the appellant asked the Board for permission to take disciplinary action against the respondents ; but it was pointed out in the reply of the Board, Ex. D-15, dated 23rd January, 1941, that the previous permission of the Board was not necessary. Even if we ignore the Board's own interpretation of its previous order, Ex. P-2, I am satisfied that Ex. P-2 itself empowers the interim trustee to exercise all the powers of a trustee. The prominence given in this short order to pending proceedings merely indicates the urgency felt by the Board at the time this order was passed.

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1. (1944) 1 M.L.J. 82 : I.L.R. 1944 Mad. 534.

It follows from what has been said above that if the appellant was properly appointed and had all the powers of a trustee, he had authority to take disciplinary action against the respondents. Sub-sections (2) and (3) of section 43 of the Act therefore bar any action in a Civil Court. These two sub-sections provide for an appeal to the Assistant Commissioner and a further appeal to the Board. Both the sub-sections state that the orders shall be final and shall not be liable to be modified or cancelled in a Court of Law.

The appeal is allowed with costs in this Court and in the Court below and the order of the District Munsiff restored.

B.V.V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Pemmani Rangappa Naidu .. *Appellant**

v.

Gurram Venkalakshamma and others .. *Respondents.*

Tenants-in-common—Possession of property by one—Basis of accounting—Conflicting decisions in execution proceedings—Rule of res judicata *—Applicability.*

In regard to one of two or more tenants-in-common, possession of property is not of a fiduciary character, and the person who is in possession cannot be called upon to account for the rents and profits upon the basis of trusteeship or similar principle, but can be called to account only in the ordinary way.

Where in an execution petition it was held that certain property was indivisible the decision operates as *res judicata* in a later execution proceeding. And the decision in the earlier proceeding cannot be called in question by reference to a contrary decision in another proceeding earlier than the one wherein the decision was given. For, as between two conflicting decisions the decision which is later in date must prevail.

Moturi Seshayya v. *Sri Rajah Venkatadri Appa Row*, (1916) 31 M.L.J. 219, relied on.

Appeal against the order of the District Court, Nellore, dated 20th August 1946, in E.P. No. 19 of 1946 (in O.S. No. 47 of 1929 on the file of the Subordinate Judge's Court of Nellore).

K. Krishnamurthi and *G. Suryanarayana* for Appellant.

Ch. Raghava Rao for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of an execution petition, E.P. No. 19 of 1946, in O.S. No. 47 of 1929 on the file of the Subordinate Judge's Court of Nellore. The suit was one for partition instituted by the plaintiffs, who are respondents 1 to 3 here against three defendants. The second defendant was the karta of the family and is the appellant. The other defendant-respondents can be ignored.

On 1st February, 1933, a compromise decree was passed and it is in respect of that decree that the execution petition out of which this appeal arises was issued. The relief sought by the petition was for a division of moveable and immoveable properties belonging to the family, amongst the members according to their shares. Three lots of property are concerned—(1) promissory notes representing debts due to the family, (2) cattle which belonged to the family, and (3) items of immoveable property similarly possessed. The suit was instituted in 1929, and in 1933, when the decree was passed, it was tolerably manifest that the promissory notes were all barred by limitation. In fact during the progress of the suit they were all ordered to be deposited into Court and that order was complied with by the present

* A. A. O. No. 581 of 1946. 7th January, 1948.

appellant, the late karta of the family. So far as the cattle were concerned, they were admittedly and undoubtedly in the possession of the appellant. As regards the immoveable property, that was the subject of some proceedings in execution prior to the petition out of which this appeal arises.

The learned District Judge of Nellore, before whom the execution petition came for disposal, expressed the opinion that the appellant was in a fiduciary position to the respondent-plaintiffs by virtue of his late position as karta of the family, and being in possession of property, formerly joint property, and he directed the appellant to account in respect of the promissory notes and cattle on the basis of fiduciary relationship. In regard to the immoveable property, he passed orders by which three of the nine items were to be divided between the sharers.

Firstly in regard to the promissory notes: From the date when pursuant to an order of Court, the appellant parted with their possession and deposited them into the Court, where they have since remained, he had no possession of them either as trustee or in any other capacity. That aspect was apparently overlooked by the learned Judge. The items of moveable property, namely, the promissory notes and cattle, are set out in Schedule 1 of the decree. In regard to the cattle, the schedule records that they were in the possession of the appellant. There is no such indication in regard to the promissory notes. In paragraph 6 of his judgment the learned District Judge seems to have held the view that, even if the promissory notes became barred owing to reasons beyond the control of the appellant, nevertheless in some way he would be responsible for that operation of the law taking place. I am unable to accept his view in the matter, but no examination regarding that is necessary inasmuch as the appellant was not having possession of the promissory notes. They were in the custody of the Court and the plaintiffs themselves (the decree-holders) equally with the appellant, could have taken steps to prepare for suits to be filed upon these notes if the debtors failed to make payments according to their respective promises. The promissory notes in no way being in the possession, custody or power of the appellant, he is under no obligation to account in respect of them.

In regard to the cattle, the appellant, as already pointed out, makes no challenge to the allegation that, when the suit was instituted some nineteen years ago and sixteen years before the institution of the execution petition out of which this appeal arises, he was in possession of certain cattle. He stated that some beasts had died from natural causes, some had been seized in execution and others had been sold to meet family necessities and debts. But he gave no details or any information, barring the statement above mentioned. In respect of the cattle also, the learned District Judge arrived at the conclusion that the possession of the appellant of the beasts was by way of a fiduciary character, and he was ordered to account on that basis. Learned counsel for the respondent-plaintiffs has not challenged, the correctness of the position that, upon the institution of the partition suit, rupture took place in the family status and no longer was there joint family property but the members of the family, in respect of the property became tenants-in-common. It is beyond doubt that, in regard to one of two or more tenants-in-common, possession of property is not one of a fiduciary character. It was so held in *Kennedy* v. *De Trafford*[1] which decision was referred to and its principles accepted by this Court in three cases—*Ramaswami Aiyar* v. *Subramania Aiyar*[2], *Abdul Samad Khan Kiladar* v. *Bibi Jan*[3] and *Venkatasubbamma* v. *Subbamma*[4]. The same view has been accepted in decisions of the Allahabad High Court. No authority was cited to support the proposition that tenants-in-common or co-owners or persons in like position are in fiduciary relationship to one another in regard to property possessed by them. In my view the appellant cannot be called upon to account upon the basis of trusteeship or similar principle. He must however account in the ordinary way in respect of joint family property which was in his possession some eighteen years

1. (1897) A. C. 180.
2. (1922) 43 M.L.J. 406 : I.L.R. 46 Mad. 47.
3. (1925) 49 M.L.J. 675.
4. (1944) 2 M.L.J. 257.

ago and in respect of which the respondents called upon him to account some sixteen years after they had instituted the suit for partition and twelve years after a decree had been obtained. The account will be solely as between tenants-in-common.

Now, in regard to the immoveable property: As stated above there are nine items which figure in Schedule 2 of the compromise decree in the suit. Clause 6 of that decree, so far as material, provides that:

> "Out of the properties mentioned in paragraphs 3 to 5 *supra*, the property mentioned in Schedule No. 2 annexed hereto shall be held jointly by the plaintiffs and defendants 2 and 3, and they shall enjoy the same according to the shares specified in paragraphs 3 to 5, *supra*."

In Schedule 2 a note appears against items 4 to 9 that those properties shall be held jointly. No such note is found with regard to items 1 to 3. On behalf of the appellant it was argued that clause 6 provides that none of the items of immoveable property are divisible, and hence the relief sought in the execution petition for division must fail. On the other hand it was contended on behalf of the respondents that the property, particularly indicated in Schedule 2 as being joint, namely items 4 to 9, alone remains of that character but not the other property.

Before expressing my view with regard to this matter it is necessary to refer shortly to the execution proceedings which have taken place since the decree was passed in 1933.

In 1936 the plaintiffs-decree-holders filed E.P. No. 13 of of 1936 for division of moveable and immoveable properties. Nothing further was done and in October, 1936, that petition was struck off for want of prosecution. The same fate was met by E.P. No. 15 of 1936. In 1939 and 1940 two further execution petitions were instituted; and they also terminated by similar disposal. On 31st July, 1940, E. P. No. 96 of 1940 was instituted, the same relief being sought, namely, division of immoveable properties belonging to the family. That petition received final disposal on 1st October, 1941, when it was dismissed. In the course of the order in E.A. Nos. 75 and 84 of 1941 the learned Subordinate Judge of Nellore Mr. A.M.S. Tagat, before whom the matters came for disposal held that the immoveable properties in Schedule 2 could not be divided inasmuch as clause 6 of the decree forbade such division by directing all the properties to be joint. His conclusion in that respect is to be found in paragraph 5 of the judgment. No appeal was preferred against his decision and it remains a final and conclusive order. There were other proceedings but reference to them is unnecessary, save to E.P. No. 19 of 1946 which is the petition now under consideration.

Learned counsel for the appellant raised a question of *res judicata*, and he relies upon the decision in E.P. No. 96 of 1940 and in E.A. Nos. 75 and 84 of 1941 in which it was held that the immoveable properties, in their entirety, are not subject to division, pointing out that that was a decision by a competent Court, and, whether it is correct or whether it is incorrect it matters not, it is conclusive as between the parties. That point was raised before the learned District Judge of Nellore who rejected it, it would appear, on the ground that in the several execution petitions prior to 1940 the appellant did not raise the point that none of the immoveable properties are divisible by reason of the provision contained in clause 6 of the decree. It is manifest that there was no decision in any of the earlier execution petitions, all of which were terminated, it may be after some preliminary directions had been given. The only execution petition in which a decision was given was E.P. No. 96 of 1940, already referred to and in which the decision was expressed regarding the indivisibility of the immoveable property But, even assuming, which is not the case here, that in an execution petition prior to that instituted in 1940 there had been a decision to a contrary effect to that expressed in the execution petition above mentioned, nevertheless, since the decision in E.P. No. 96 of 1940 is later in date, that decision must prevail. It was so found regarding a decree by a Division Bench of this Court in *Moturi Seshayya* v. *Sri Rajah Venkatadri Appa Rao*[1].

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1. (1916) 31 M.L.J. 219.

In my opinion the question is *res judicata* as between the appellant and the plaintiff-respondents regarding the immoveable property which belonged to the family at the time when the members were joint in status. There has been a decision of a competent Court that the property is not divisible and that decision remains, it has not been set aside, nor any steps taken to have it set aside. In my view, so far as the immoveable property is concerned, the matter is concluded, and the relief sought in E. P. No. 19 of 1946 for this property to be divided is not available to the respondent-plaintiffs by reason of the decision that the property is not divisible.

In my opinion the order of the learned District Judge in the Court below must be set aside regarding his directions relating to the promissory notes and the immoveable property. In so far as cattle are concerned, his order will be varied to the extent indicated above. The appellant has, in substance, succeeded in this appeal and that being so, in my view, he is entitled to costs.

Satyanarayana Rao, J.—I agree.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

In the matter of Pandiri Subba Rao and another *Insolvents.*

Gujju Annapurnamma and others .. *Applicants**

v.

The Official Assignee, High Court, Madras .. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), Second Schedule, clause 23 (2)—Insolvents carrying on family business—Deposits made by persons—Amounts carried forward from year to year with interest at twelve per cent. per annum—Proof of claim—Amounts on which interest is to be calculated for purposes of dividend—Interest on amount whether can be calculated at six per cent. per annum for purposes of dividend—New debt if created by carrying forward old debt.

The insolvents who were carrying on a family business were adjudged insolvents in 1946. In the books of their business it was shown that certain close relatives of the insolvents had made deposits during the years 1917 to 1929 and that the amounts were carried forward from year to year with interest calculated at twelve per cent. per annum. The Official Assignee admitted the claims in respect of the deposits but in doing so he held that, for purposes of dividend, interest should be calculated only at six per cent. per annum on the amounts originally deposited from the date of deposit to the date of adjudication.

Held, that the debts provable were not the original debts but the capital sums consisting of a number of debts inclusive of interest which was calculated at the end of each year at twelve per cent. per annum and carried forward in the books of account, and that the depositors were entitled to take into consideration for purposes of dividend the capitalised amount shown to their credit in the last account, namely, of the year 1929, together with subsequent interest at six per cent. per annum from that date till the date of adjudication.

Paton v. *Inland Revenue Commissioners*, (1938) A.C. 341, relied on.

M. Subramania Sarma for Applicants.

P. Sivaramakrishniah (Deputy Official Assignee) for Respondent.

The Court delivered the following

JUDGMENT.—The two insolvents are brothers and were adjudicated in February, 1946. They are members of a family which carried on business on a large scale at Rajahmundry in the East Godavari district as timber dealers, money lenders, etc. In the books of this family business amounts appear to have been deposited by close relatives of the insolvents. The earliest books available to the Official Assignee are those for the year 1917 and the latest those for the year 1929. I understand that the books for one or two years between 1917 and 1929 are missing.

The Official Assignee is satisfied that these deposits were made and that the entries in the books of account evidencing them are genuine. Accordingly he has accepted the entries of such deposits as sufficient evidence that moneys to that extent were deposited by the several depositor relatives on the dates and the

*Applications Nos. 589 to 597 of 1947 in I.P. No. 1 of 1946. 8th December, 1947.

amounts shown in the books of account. In some cases, the first books of account available those for 1917 show an amount carried forward from the previous year's accounts. These entries the Official Assignee has disregarded, except in those cases where the depositor concered has been in a position to satisfy him by other evidence of the actual amount deposited and the date of deposit.

Subject to this last qualification the deposits evidenced by the accounts have been admitted by the Official Assignee for the amounts shown due by the books of the firm for the year 1929 with interest thereafter until the date of adjudication at the contract rate of 12 per cent. per annum. But, in so admitting these proofs, the Official Assignee has directed that, for the purposes of dividend, interest will be allowed at only 6 per cent. per annum on the amounts originally deposited from the date of deposit up to the date of adjudication. I understand that the books of account of the firm between 1917 and 1929 show that interest was calculated during that period at the rate of 12 per cent. per annum compound interest and the Official Assignee has allowed the proof with interest at that rate up to the date of adjudication after deducting the drawings. For payment of dividends, however, he claims that interest should be allowed throughout on these deposits at only 6 per cent. per annum.

Nine of the depositors have now appealed against his decision and one—the applicant in application No. 593 of 1947—complains in addition that the Official Assignee has unjustifiably disregarded the amount shown to his credit in the insolvent's accounts at the beginning of 1917. A credit in his favour is there shown as carried forward from the previous account and it is admitted that no earlier accounts were produced to the Official Assignee and indeed that no earlier accounts are now forthcoming. In these circumstances, I am not prepared to vary the Official Assignee's refusal to accept the proof for the amounts shown as carried forward. A second cause for complaint is, however, urged by this applicant. It is urged that deposits were made during the years for which the accounts are missing. The Official Assignee agrees that this may be so, inasmuch as there is a substantial amount shown as carried forward in the first year after the years for which the accounts are missing. Counsel for the applicant states that his client is now in a position to secure the production of the accounts for the missing years for inspection by the Official Assignee and asks that he may be given an opportunity to do this. The Official Assignee has no objection and, accordingly, application No. 593 of 1947 is on this point adjourned and the Official Assignee will have it put in the list again for orders when he has been able to examine the accounts for the missing years. I will now deal with that application and the other eight applications on the question common to all.

The objection taken is that the Official Assignee is not justified in his decision to allow interest for the purpose of dividend at only 6 per cent. instead of at the contract rate of 12 per cent. This decision of the Official Assignee is, of course, founded on clause 23 (2) of the second schedule to the Presidency Towns Insolvency Act. That clause reads as follows :

> " Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 6 per cent. per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full."

Now the Deputy Official Assignee, who has argued this case most ably on behalf of the Official Assignee, puts his case as follows : He claims that the applicants have proved in respect of debts, which include interest. He claims that those debts are the amounts originally deposited and, accordingly, that clause 23 (2) of second schedule is directly applicable.

It is urged on behalf of the applicants that the view taken by the Official Assignee is unjustified on the grounds that the original deposits cannot be properly regarded as the debts provable. It is common ground that the books show interest at 12 per cent. per annum calculable at yearly rests and, accordingly, counsel for the

applicants urges that the debts here provable must be the amounts shown in the last available books of the insolvents, those for 1929. It is urged that the amounts there shown are the amounts settled after payment of interest for the year and after adding those amounts to the principal sums due at the commencement of that year.

In support of his contention, the Deputy Official Assignee relies upon the decision in *Kanto Mohan Mullick* v. *J. C. Galstaun and the Official Assignee of Bengal*[1]. The proof in insolvency under consideration in that case was a loan of a lakh of rupees on terms that two lakhs of rupees should be repayable. If the loan was not repaid within six months it was to bear interest at 12 per cent. per annum at monthly rests. Rankin, C.J., held that for the purposes of dividend, the debt must be regarded as one of a lakh of rupees carrying interest at 6 per cent. per annum. He arrived at this decision in reliance on the provision of the Bankruptcy law set out in clause 23 (2) of the second schedule.

Counsel for the applicants does not seek to question the correctness of this decision, but he claims that it can have no application to his clients' proof and, after careful consideration of the point, I agree with his contention. The point involved is one of considerable difficulty and I allowed an adjournment of one week to enable counsel to consider the authorities further. A number of cases have very properly been brought to my notice by the Deputy Official Assignee, which unfortunately for his case have satisfied me in the view which I have just expressed. I am however nonetheless indebted to the Deputy Official Assignee for his assistance in bringing these cases to my notice.

I am satisfied on the authorities, particularly on the decision of the House of Lords in *Paton* v. *Inland Revenue Commissioners*[2] and the decision in *Reddie* v. *Williamson*[3], which was discussed at length in *Paton's case*[2], that an arrangement by which money is deposited at compound interest calculable at periodic rests is properly to be regarded as an agreement between the parties that the interest as it accrues and at the end of each fixed periods shall become principal. Most of the cases to which I have been referred are banking cases, and, though the insolvents were not bankers, it is found by the Official Assignee that in the present case, the applicants' moneys were deposited on the terms that were repayable on demand. In this connection it will be noted from his order that he accepted that all these claims were governed by Article 60 of the Limitation Act. Now the learned Judges who disposed of *Paton's case*[2], considered at length the nature of the transaction between a banker and his customer in respect of moneys repayable on demand with compound interest. Lord Macmillan at page 357 observed :

> "Now it may well be that as between a bank and its customer this method of dealing may have the result that the accrued interest which the bank has with the customer's assent added to the principal loan thereby ceases to be due or recoverable as interest, but becomes merged in the principal loan."

and later at page 359 his Lordship added :

> "It may well be that in a question between a bank and its customer, and equally between a bank and its customer's cautioner, the interest accruing annually may by the sanctioned method of accounting cease to be interest when it is accumulated with the principal, so that the bank can thereafter no longer sue for the interest as interest."

From a perusal of *Paton's case*[2] and from the judgments in other cases, which have been brought to my notice, it seems clear that it has long been accepted that the payment of compound interest on a loan with periodic rests is properly to be regarded as a payment by the debtor of the interest and a fresh redeposit of that amount with the creditor. It appears that this method of calculating interest arose in order to avoid the prohibition of the old usurious loans legislation. However that may be, I am satisfied that each of the amounts claimed by the applicants must be regarded as one debt, the amount due at the date when interest was last compounded before the commencement of the insolvency. Of course

1. (1928) 51 Cal.L J. 283.
2. (1938) A C. 341.
3. (1863) 1 Macph. 228.

each those debts consists of, first, the debt arising from the original deposit, but to that are added a number of other debts arising from year to year and each being in respect of the annual interest. On this view of the matter, the amount shown in the insolvents' last available books of account, those for 1929, as due to any one of these depositors is not a sum including any interest, but is a number of capital sums added together.

Accordingly I am unable to regard the original debts as the debts which are now being proved in insolvency, nor can I regard the applicants as proving for any interest in respect of the period between the dates of their deposits and 1929. As regards the amounts claimed as due in respect of that period, I consider that they must be regarded as proofs for a capital sum consisting of a number of debts. Accordingly, I vary the orders of the Official Assignee in each of these cases by directing that the amounts due to the applicants shall be calculated for the purposes of dividend by taking in each case the amounts shown due in the 1929 books (in those cases where he has accepted the proof of the origin of the loans) and adding thereto interest at the rate of 6 per cent. per annum until the date of adjudication.

The points involved in this case are of considerable difficulty and they have been argued on behalf of the nine applicants by one counsel. In the circumstances, I think it will be reasonable to allow costs for one advocate out of the insolvents' estate. I fix those costs at Rs. 100.

B.V.V. ——— *Applications allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The Public Prosecutor .. *Appellant**

v.

Kupandra Chetty .. *Respondent.*

Madras Prevention of Food Adulteration Act (III of 1918), section 5 (1) (d) and rule 28 of the rules framed under the Act—Brother of owner of a shop selling ghee not up to the required standard of purity—If liable.

A person who offers for sale any ghee which is not up to the standard of purity prescribed by rule 28 of the rules framed under clause (*b*) of sub-section (2) of section 20 of the Madras Prevention of Food Adulteration Act, though he may not himself be the owner of the shop but is only the owner's brother and may not have any rights in the business at all, still by his remaining in the shop in the absence of his brother and acting as his deputy, he has to be considered as the person who offered the ghee for sale and can be convicted of an offence under rule 28 of the rules and under section 5 (1) (*d*) of the Act.

Appeal under section 417 of the Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Court of the Stationary Sub-Magistrate, Kallakurichi, in C. C. No. 854 of 1947 on his file.

The appellant in person.

S. Viswanathan for *M. S. Venkatarama Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—Under section 417 of the Code of Criminal Procedure the Public Prosecutor, Madras, appeals against the acquittal of the respondent of an offence under rule 28 framed under clause (*b*), sub-section (2) of section 20 of the Madras Prevention of Food Adulteration Act and under section 5 (1) (*d*) of the said Act.

The prosecution case is that P. W. 1, the Health Inspector at Kallakurichi, went to the shop where the respondent was at about 8 A.M., on 15th October, 1946, and wanted a sample of ghee from him. The respondent gave the ghee and received 5 annas being the price. This ghee was tested and found to contain 94 per cent. of fat not derived from milk or cream and thereafter the prosecution was instituted. The defence of the respondent was that he was not the owner of the shop where the ghee was offered for sale, that he did not sell the ghee and therefore he was

* Criminal Appeal No. 548 of 1947. 5th March, 1948.

not guilty of any offence. The lower Court found that the shop wherein the ghee was exposed for sale and sold, belonged to a joint family of the respondent and his brother, M. S. Palanisami Chetti and that the owner of the shop was this Palanisami Chetti. The respondent was in the shop only in the absence of his brother, and relying upon a decision in In re *Bellamkonda Kanakayya*[1], the lower Court held that the respondent was not guilty. In addition, the finding was that P.W. 1 was not acting under section 14 of the Act but simply purchased the ghee as an ordinary individual and since there was no sale as contemplated by section 5 the respondent was held not guilty.

In my view the learned Magistrate has not correctly appreciated the evidence in the case. There is no reason to doubt the credibility of the evidence of P.W. 1, nor is anything suggested to that effect. P.W. 1 says that the respondent was in the shop when P. W. 1 asked him whether he had ghee ; and on getting the reply in the affirmative, P. W. 1 purchased ghee for 5 annas for which a cash bill was given by the respondent. After the ghee was purchased and the money was paid, P. W. 1 told the respondent that he wanted the same for taking a sample. Though it is stated by P. W. 1 that the respondent told him that it was tiffin ghee, I do not think that anything can be made out of that. There is no such material as tiffin ghee contemplated by the Madras Prevention of Food Adulteration Act.

Mr. S. Viswanathan for the respondent strenuously argued that since the business stood in the name of Palanisami Chetti, the respondent cannot be said to be the person who in the words of section 3 (1) (*d*), offers for sale any ghee which is not upto the standard of purity prescribed by the local Government. He further relied on rule 28, to the effect that no person shall sell or have in his possession for purposes of sale or for use as an ingredient in the preparation of an article of food for sale, a mixture of ghee or butter and any substance consisting of or containing any oil or fat which does not conform to the definition of ghee in the Act. On the evidence of P. W. 1, it is difficult for me to hold that the respondent was not the person who offered the ghee for sale or to hold that the respondent did not have in his possession the article which did not conform to the definition of ghee in the Act. Exs. D-1 to D-3 are relied upon to show that Palanisami Chetti is the owner of the shop. Even if that is correct and even if the respondent though a member of the joint family did not have any rights in the business, still I am inclined to hold that the respondent remaining in the shop in the absence of his brother and acting as his deputy can be considered as the person who offered the ghee for sale. It is not suggested that the respondent was there only as a casual visitor or that he did not go there for the purpose of looking after the business. In these circumstances I hold that the respondent was the person who offered for sale the quantity of ghee which did not conform to the definition of the word in the Act. The appeal is therefore allowed and the respondent is found guilty of the offence with which he is charged and sentenced to pay a fine of Rs. 5 or in default to simple imprisonment for one week.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

H. Syed Abbas Saheb and others .. *Appellants**

v.

I. Syed Amir Hamiza Saheb and others .. *Respondents.*

Deed—Construction—Settlement with first a direction regarding expenses on charitable purposes—Then, surplus to be divided among certain specified persons—Latter portion also a trust—Section 10 *of the Limitation Act applies—Suit for account by persons interested in the surplus—Section* 92, *Civil Procedure Code, if applicable.*

Where in a settlement there is first a direction for the expenses to be incurred on certain religious purposes and following this there is a direction that the surplus shall go to and be

1. (1942) 2 M.L.J. 172.

* A.A. O. No. 607 of 1946. 23rd January, 1948.

applied for the benefit of certain persons, there is a trust as much in respect of the latter part of the disposition as in respect of the former. A specific purpose includes a purpose which, from the specified terms can be certainly affirmed, and therefore the distribution of the surplus in named proportions is a specific purpose. Section 10 of the Limitation Act is therefore applicable to a suit by the persons entitled to the distribution of the surplus.

The plaintiffs in such a suit in asking for accounts of their share of the surplus, merely seek to enforce their private rights in the surplus which remains after the charitable purposes are met, and it is not in respect of the charitable purposes. The bar under section 92 of the Civil Procedure Code cannot therefore arise in such a case.

Appeal against the order of the District Court of Madura dated the 25th day of October, 1946, and made in A. S. No. 72 of 1946 (O. S. No. 126 of 1945, Subordinate Judge's Court, Madura).

S. Panchapakesa Sastri and *K. V. Srinivasa Aiyar* for Appellants.

N. Rajagopala Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is against an order of remand of the District Judge of Madura. It arises out of a suit by the representatives of the branch of one Syed Ismail who was the second son of one Kadir Batcha Sahib, principally against the first defendant who is the eldest son of one Hyder Ali who was the eldest son of Kadir Batcha Sahib. The suit was for an account of the plaintiff's share of the surplus income of certain properties from the year 1922 till the date of suit and for recovery of the amount found due on such account being taken. A preliminary decree for accounts was passed by the Principal Subordinate Judge of Madura. On appeal the District Judge of Madura remanded the suit for a decision by the trial Court on issues 1 and 2 and issue 4 among the additional issues before the case is sent to the commissioner for taking accounts.

It was not contended in the civil miscellaneous appeal that the direction that these issues should be first dealt with by the trial Court is incorrect; but it was argued that the learned District Judge should have held that the suit was bad under section 92, Civil Procedure Code, as the requisite sanction was not obtained and that a portion of the suit claim should have been held to be barred by limitation by the application of Article 62 or Article 120 of the Limitation Act. The trial Court held that no part of the suit claim was barred by limitation as the case fell under section 10 of the Limitation Act and also that there was no substance in the contention based on section 92, Civil Procedure Code. It would appear that both these points were abandoned before the learned District Judge. Mr. Panchapakesa Sastri, the appellant's counsel, however argued that these are questions of law and that he should be permitted to raise these points in this Court notwithstanding that they were given up in the lower appellate Court. As it was contended that both the points turn on the construction of a document to which I shall presently refer I permitted them to be argued.

Kadir Batcha Sahib executed on the 25th of August, 1913, a document which is described, as a settlement deed in respect of charity. The following sentence which occurs almost at the beginning of the settlement deed is material and may be fully set out:

"I have made the properties mentioned hereunder and all their income liable from this date for the undermentioned charitable expenses, etc., and hence in accordance with the terms mentioned hereunder, as long as the sun and the moon last."

The document then goes on to provide that Kadir Batcha himself should conduct the affairs during his lifetime, that after his death they should be conducted by his eldest son Syed Hyder Ali and that after Hyder Ali's death his eldest son "shall be the managing trustee." It may at once be pointed that throughout the document the person concerned is described by the English word "trustee," the document itself being in Tamil. There is a direction that the trustee shall let out the properties, conduct all proceedings, pay the theerva and the salaries of the staff, carry out the repairs of the village house and incur the necessary expenses for lighting item No. 7. There are then a series of directions as to certain religious

services which have to be carried out. Then follows the clause whereby it is provided that the income remaining after excluding the above-mentioned theerva, the expenses of staff and charity, etc. " shall be paid by the trustee as mentioned hereunder for the maintenance of the persons mentioned hereunder out of my family members." Kadir Batcha had a wife, three sons and a daughter. The surplus amount is directed to be divided into six shares, the wife and the four children taking five shares and the eldest son taking the extra share as trustee. After the wife's death the surplus was to be divided into five shares, the trustee taking here again the extra share. The right to a share of the surplus income is made descendable in the several branches. If any of the settlor's issue should die without leaving any issue the persons having issue were to " divide the proportionate amount for the share in accordance with Muhammadan Law." There is prohibition against alienation. Patta in respect of the properties was to be obtained in the name of the trustee for the time being in his capacity as such trustee. There are other provisions which are not material for the purpose of the present discussion.

Kadir Batcha died in 1922 and was succeeded in the trusteeship by his eldest son Hyder Ali who acted as trustee till his death in 1942 being succeeded in his turn by his eldest son, the first defendant. The plaint prayer is that the plaintiffs' share of the surplus income from 1922 to 1942 should be directed to be paid out of the assets of Hyder Ali in the hands of his heirs and that for such share received from and after 1942 a decree should be passed against the first defendant.

Mr. Panchapakesa Sastri contended that in regard to the distribution of the surplus income no trust has been constituted and that section 10 of the Limitation Act is therefore inapplicable, the period of limitation being either three or six years according as Article 62 or Article 120 is held to be applicable. He criticised the judgment of the Subordinate Judge as proceeding principally on the opening sentence which according to him has not been properly interpreted. He said that the expression " charitable expenses, etc." should be read as referring only to the expenses by way of taxes, litigation charges, repairs and the amounts spent for the purpose of the religious services which were enjoined, and that the expression should not be read as including the distribution of the surplus income among the several descendants of the settlor. Reliance was particularly placed on the sentence where, after referring to the expenses of charity, etc., the deed of settlement proceeds to direct the division of the surplus income into several shares among the members of the settlor's family. It was contended that the expression " charitable expenses " should be read as having the same meaning throughout the document, and that if it is so read the opening sentence on which considerable reliance was placed by the trial Court will not support the conclusion that a trust is constituted in respect of the distribution of the surplus also. It is doubtful whether such a strict rule of construction should or can be applied to a document of this description where the draftsman was presumably referring in a compendious way to the principal item of expenditure referring to all the other items by the vague expression, "etc." or its Tamil equivalent " vagaira." Mr. Rajagopala Ayyangar, respondents' counsel, argued that the expression must be construed according to the context.

However that may be, it seems to me that the question that has now arisen should be decided on a reading of the entire document with a view to ascertain the intention of the settlor without undue emphasis on any particular expression occurring in any portion of it. The provision that the properties dealt with by the deed should be entered in the name of the trustee for the time being in his capacity as trustee and the prohibition against alienation leave no room for doubt that the properties are vested in trust in the successive trustees. It cannot again be doubted —and in fact it has not been denied—that there is a trust created in respect of religious services which are detailed in the earlier part of the document. It is also clear that the only person who is entitled to collect rents and profits is the trustee in whom the properties themselves are vested. The appellants' contention would involve the conclusion that so far as the surplus is concerned the several

sharers are the owners while the properties themselves and the amounts which have to be spent on the religious services are vested in the trustee who is the legal owner. It is sufficient to say that such transference of ownership at that stage is hardly likely and could not have been intended. Moreover, it will be noticed that the surplus itself is directed to be paid by the "trustee" thereby indicating a trust even at that stage. Some reference was made to the clause which provides that in the event of the death of one of the settlor's children without issue the persons having issue shall divide the proportionate amount of the share. This can only mean that the right to receive that share devolves in the manner indicated and not that the recipients are thereby constituted legal owners. In other portions of the document a division of the surplus is either directed in the passive voice or the trustee himself is asked to distribute the surplus in the specified shares to the several persons named as being entitled to receive it. It was said that the surplus was a contingent one, that there may in fact be no surplus in certain years and also that division of the surplus is contemplated every year. These were referred to as indicative of an ownership of the surplus by the settlor's descendants. These circumstances however seem to me to be in no way indicative of such ownership or to be inconsistent with the existence of a trust in regard to the surplus if and when there is one. It is well known that among Muhammadans the maintenance of one's own descendants is regarded as a charitable or quasi-charitable object as is apparent from the conception of a wakf and legislation in regard to wakfs. The description of all the properties mentioned in the document as charitable need not therefore evoke any comment or cause any surprise; but this apart, on a fair reading of the entire document I have no hesitation in coming to the conclusion that a trust was constituted not only in regard to the religious services but also in regard to the distribution of the surplus among the descendants of the settlor, the trusteeship being descendable in the manner laid down in the deed.

The question whether there is or is not a trust in regard to the relevant portion of the disposition is one to which the answer depends on the construction of the document whereby the disposition is made, and the decisions bearing on the construction of other documents cannot be of any great help. On behalf of the appellants reliance was placed on *Hussain Ali* v. *Baquir Ali*[1] and *The Secretary of State for India in Council* v. *Guru Proshad Dhur*[1]. In the former case, the sale proceeds of a certain casuarina plantation were handed over by the person who sold the property to the defendant with the consent of the majority of the heirs with instructions to the defendant to distribute the money among the heirs in accordance with their respective interests. It was pointed out that the person who handed over the money to the defendant was not its owner. There could therefore be no transfer of ownership by such person to the defendant. Reliance was also placed on the fact that there was no document declaratory of the alleged trust as contemplated by section 5 of the Trust Act, 1882. The defendant had no legal title to the money and there was therefore no express trust within the meaning of section 10 of the Limitation Act which requires that the property should be vested in the defendant or his predecessor-in-interest in trust for a specific purpose. This case, in my opinion, presents no analogy whatever. In *The Secretary of State for India in Council* v. *Guru Proshad Dhur*[2], the Government held certain surplus sale proceeds realised at a revenue sale. Under section 31 of Act XI of 1859 the Collector was to hold the residue, if any, in deposit "on account of the late recorded proprietor." The question was whether an express trust was thereby constituted. It was held by a majority of Judges that there was no such trust, the relevant words of section 31 being construed as in no way depriving the proprietor of the ownership of the residue and vesting the same in the Government. It is unnecessary to examine the several reasons given by the learned Judges for arriving at this conclusion. As Ghose, J., observes, there was no fiduciary relationship between the Government and the late proprietor as it could not be said that any confidence was reposed in the former by the latter. The dissenting Judge, Pigot, J., held that there was

1. (1945) 2 M.L.J. 422.
2. (1892) I.L.R. 20 Cal. 51 (F.B.)

a trust basing his judgment principally on the analogy of a mortgagee's power of sale. I am unable to deduce from the decision in *The Secretary of State for India in Council* v. *Guru Proshad Dhur*[1] any general principle which can be of help in the construction of the document before me.

The decisions in *Syud Shah Alleh Ahmed* v. *Mst. Bibee Nuseebun*[2] and *Mahomedsa* v. *Khadirsa*[3] were concerned with documents more or less in similar terms as the document in this case. In both there was first a direction for the expenses to be incurred on certain religious purposes and following this there was a direction that the surplus of the remainder should go to and be applied for the benefit of certain persons. It was held that there was a trust as much in respect of the latter part of the disposition as in respect of the former. In *Mahomedsa* v. *Khadirsa*[3], it was pointed out by a quotation from the decision of the Privy Council in *Khaw Sim Tek* v. *Chuah Hooi Cnoh Neoh*[4] that a specific purpose includes "a purpose which, from the specified terms, can be certainly affirmed." Applying this test there is no reason to doubt that the distribution of the surplus in named proportions is a specific purpose; nor can there be any doubt that the property and the income are vested in the trustee. I have therefore to overrule the contention of the appellants' counsel that section 10 of the Limitation Act is not applicable.

The argument regarding the bar under section 92, Civil Procedure Code, can be shortly dealt with. The account that is asked for does not relate to the charities which were directed by the settlor. The plaintiffs are seeking to enforce their private right in the surplus which remains after the charitable purposes are met. No account is asked for in respect of those purposes. The bar under section 92 does not therefore arise.

In the result I agree with the judgment of the learned Subordinate Judge which in these two respects was not challenged in the lower appellate Court and dismiss the appeal with costs of the plaintiffs-respondents.

No leave.

V.P.S. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

The Official Receiver, East Godavari, representing the estate of Tadi Bulli Gangireddi of Rajahmundry .. *Appellant**

v.

Tadi Murali Mohan Reddi and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 82—Contract to the contrary—Meaning of—Provincial Insolvency Act (V of 1920), section 37—Vesting of insolvent's property on annulment of adjudication—Powers of Receiver—Right to enforce claim for contribution.

A 'contract to the contrary' within the meaning of section 82 of the Transfer of Property Act, is a contract between a mortgagor and a mortgagee. A mortgage by two mortgagors of their properties under which the properties of the first mortgagor were to be liable in the first instance and the other properties were to be liable only in the event of the security of the properties liable in the first instance being insufficient would be such a contract.

Where certain properties are vested in a Receiver under section 37 of the Provincial Insolvency Act on the annulment of an adjudication his powers in respect of such properties need not be expressly conferred by the order made under section 37, they may be such as are necessarily implied by the vesting order and the receiver will have in respect of such properties the powers he had in respect of the insolvent's properties generally before the date of the annulment. The Receiver would be entitled to maintain a suit to enforce a claim for contribution possessed by the insolvent.

Appeal against the decree of the Court of the Subordinate Judge, Coconada, in O.S. No. 83 of 1944, dated 30th November, 1945.

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1. (1892) I.L.R. 20 Cal. 51 (F.B.).
2. (1874) 21 W.R. 415.
3. A.I.R. 1927 Bom. 398.
4. (1921) L.R. 49 I.A. 37 : 25 Bom.L.R. 121 (P.C.).

*Appeal No. 202 of 1946. 22nd January, 1948.

M. S. Ramachandra Rao for Appellant.

T. V. Ramanatha Aiyar for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—The appellant's suit for contribution under section 82 of the Transfer of Property Act was dismissed by the Subordinate Judge of Coconada on the ground of non-joinder. One Tadi Bulli Gangireddi was adjudged insolvent on the 13th of November, 1931, in I.A. No. 12 of 1931 which was filed on 17th March, 1931, in the Court of the Subordinate Judge of Coconada. Nine days before the order of adjudication Gangireddi's son who is the first respondent in this appeal and who was the first defendant in the Court below filed O.S. No. 250 of 1931 in the Court of the District Munsiff of Ramachandrapur against his father for partition of the family properties. This resulted in a preliminary decree on the 16th of November, 1931. The Official Receiver was impleaded in the suit on the 16th of February, 1932. Another son was born to Gangireddi in 1934. He is referred to throughout the record by the curious description of " an unnamed boy." Gangireddi died on the 17th of January, 1934. The second son was impleaded in the partition suit on the 26th of November, 1934, and by the final decree passed in that suit on the 6th of April, 1935, the properties as per list B attached to the decree were allotted to the elder son. Nothing was said about the remaining properties. There can be no doubt that the properties in list B and the other properties were of equal value. Respondents 2 and 3 who were defendants 2 and 3 in the Court below obtained a decree in O.S. No. 2 of 1935 on the file of the Court of the Subordinate Judge of Coconada against the interests of the sons of Gangireddi, and sometime in August, 1935, had attached the said interests before judgment. Respondents 4 and 5 (defendants 4 and 5) obtained a money decree in similar terms in O.S. No. 26 of 1937 on the file of the Court of the Subordinate Judge of Coconada. Defendants 2 to 5 were impleaded for obtaining a direction that the plaintiff's claim for contribution is entitled to priority over the decrees obtained by those defendants, and that the amount due to the plaintiff should be a first charge on the properties described in the plaint schedule which were among the properties allotted to the first defendant by the final partition decree.

On 9th February, 1931, Gangireddi for himself and as guardian of his then minor undivided son, the first defendant, together with one Karri Gavarayya executed a deed of simple mortgage in favour of the Imperial Bank of India for Rs. 37,116-3-0. It is stated in the mortgage that Rs. 19,336-6-0 out of this was the extent of the indebtedness of Gangireddi while the balance of Rs. 17,779-13-0 was due from Gavarayya. The properties belonging to both were mortgaged, those belonging to the Tadi family being described in Schedule A attached to the deed and those belonging to Karri Gavarayya, in Schedule B. It is, *inter alia*, provided in the mortgage that,

> " You (meaning the Imperial Bank of India) should recover the entire debt due under this mortgaged property, first from the property described in Schedule A and from other moveable and immoveable properties belonging to the joint family of Bulli Gangireddi and that in case the said debt is not completely paid to you by means of the properties, you should recover the remaining debt by means of the properties described in Schedule B, by means of other moveable and immoveable properties of Karri Gavarayya and on the personal ' liability ' of Gavarayya and Bulli Gangireddi."

The mortgage debt was not repaid, and the Imperial Bank obtained a decree on foot of the deed in O.S. No. 87 of 1931 in the Court of the Subordinate Judge of Coconada. In due course of execution the bank realised Rs. 62,939-5-4 in full satisfaction of the decree, the last of the amounts which went to make up that figure being Rs. 5,359-1-0 drawn by the bank by a cheque dated 24th of November, 1937. Meanwhile the adjudication of Gangireddi was annulled on the 26th of October, 1937, under section 43 of the Provincial Insolvency Act ; but his properties were vested in the plaintiff, the Official Receiver of East Godavari, under section 37 of the same Act. The amount realised by the sale of the plaintiff's properties being Rs. 35,745, the plaintiff claimed that the amount realised from him in excess of his half share which would be Rs. 31,469-10-9 should be recovered from the

properties of the first defendant. The suit was therefore laid for Rs. 4,275-5-3 with interest thereon at six per cent. per annum from 24th November, 1937.

Several issues were raised in the Court below, and they were all found in favour of the plaintiff, except issue (11) on which the learned Subordinate Judge held that the suit was bad for non-joinder of Karri Gavarayya and the second son of Gangireddi. The first defendant filed no written statement. Defendants 2 and 3 however took the objection that the suit was bad for non-joinder of 'the several parties to the mortgage decree.'

The objection as to the non-joinder of Gangireddi's second son may be shortly dealt with. He was not a party to the mortgage decree. On a strict reading of the pleading, therefore, the objection does not extend to his non-joinder. Still the Court below went into the question and we too permitted the matter to be discussed. It is undeniable, and in fact, it has not been denied, that the second son of Gangireddi who was born long after his father's adjudication as insolvent is not entitled to any share in the properties. It was however contended in the lower Court, and it has been contended before us that as between defendants 2 and 3 and the plaintiff the suit must proceed on the footing that the first defendant is entitled to a half share, the Official Receiver to a one-fourth share and the second son of Gangireddi, to the remaining one-fourth share in the family properties by reason of an order passed in E.A. Nos. 770 and 802 of 1944 on the 22nd of November, 1944. Those were two claim petitions filed by the Official Receiver. It is admitted that no suit was filed to set aside the claim order within one year thereafter so that the conclusion cannot be resisted that for the purpose of the present suit as between the plaintiff on the one hand and defendants 2 and 3 on the other it must be assumed that Gangireddi's second son is entitled to a one-fourth share, though no such assumption need or can be made at the instance of defendants 1, 4 and 5.

It is however unnecessary to decide upon the legal consequences of this anomalous position as the plaintiff through his counsel has asked for leave to withdraw the suit against defendants 2 and 3 to which procedure no objection has been taken by their counsel. In our opinion, it is a fit case in which the plaintiff should be permitted to withdraw the suit. He will pay the costs of defendants 2 and 3 in both Courts out of the estate of Gangireddi.

The learned Subordinate Judge held that the suit was bad for non-joinder also of Karri Gavarayya. It has been contended for the appellant that there can be no claim for contribution against Gavarayya as the clause in the deed of mortgage which we have already set out is a contract to the contrary within the meaning of section 82 of the Transfer of Property Act, and reference is made in this connection to *Ramachandrachar* v. *Srinivasa Aiyangar*[1], wherein it was held that a contract to the contrary within the meaning of that section is a contract between a mortgagor and a mortgagee, and as a prominent instance of it is mentioned at page 93 of the report a contract "under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient." The principle pointed out in *Ramachandrachar* v. *Srinivasa Aiyangar*[1], was approved in a decision of a Full Bench in *Damodaraswami Naick* v. *Govindarajulu*[2]. It has been contended on behalf of the first defendant that the mention in the deed of mortgage of the amounts severally due from Gangireddi and Gavarayya would make a difference. We are unable to accept this distinction, and, in our opinion, in view of the covenant in the deed of mortgage there can be no claim for contribution by Gangireddi against Gavarayya, and in this view Gavarayya is not a necessary party.

Mr. Ramanatha Aiyar, counsel for the first defendant, however, raised another point in justification of the dismissal of the suit He argued that the right to

1. (1900) I.L.R. 24 Mad. 85.
2. (1943) 1 M.L.J. 291 : I.L.R. 1943 Mad. 531 (F.B.).

contribution must be regarded as the after-acquired property of the insolvent inasmuch as it accrued on the 24th of November, 1937, and that the plaintiff who is only a receiver appointed under section 37 of the Provincial Insolvency Act cannot enforce that right and cited in support of his argument—*Veerayya* v. *SrinivasaRao*[1], *Rajalakshmamma* v. *Raghavayya*[2], *Satyanarayanamurthi* v. *Srinivasa Jagannadh Rao*[3] and *Ramaswami Reddiar* v. *Kuppalagu Pandithan*[4]. This point was found in favour of the appellant by the lower Court with which view we are inclined to agree on principle. None of the first three cases referred to above militates against that view. In *Veerayya* v. *Srinivasa Rao*[1], King, J., who delivered the judgment of the Full Bench first referred to what he described as the three points of view in regard to the situation which arises when an adjudication is annulled, under section 43 and the insolvent's property is vested in an appointee under section 37. Disagreeing with the two extreme views (1) that with the annulment the insolvency comes to an abrupt and final conclusion notwithstanding an order under section 37 and (2) that an order under section 37 following an order under section 43 continues the insolvency proceedings for all purposes, the learned Judge expressed his and his colleague's preference to the intermediate view that when an order is passed under section 37 of the Insolvency Act, the Court retains full power to give directions as to the realisation and disposal of the debtor's assets in accordance with the provisions of the Insolvency Act. He also pointed out that the primary object of an order for annulment under section 43 is to punish the insolvent by depriving him of any protection which he may have been enjoying under the insolvency law. In discussing the position regarding applications under sections 53 and 54 a distinction was drawn (that is obiter) between proceedings which had been started before the order of annulment and proceedings which are sought to be started after such an order, and it was said that a receiver acting under section 37 could not initiate proceedings under those sections.

In *Rajalakshmamma* v. *Raghavayya*[2] and *Satyanarayanamurthi* v. *Srinivasa Jagannadh Rao*[3], it was held following *Desikachari* v. *Official Receiver, Chingleput*[5] and *Veerayya* v. *Srinivasa Rao*[1], that an application under sections 53, 54 or 54-A does not lie after an insolvent had been granted an unconditional discharge and that there is an analogy between the annulment of adjudication and the granting of an absolute order of discharge with regard to the further disposal of the insolvent's property. In our opinion, none of these decisions directly bears on the question which arises here.

If the contention of the respondent's counsel is to be acceptd a curious situation will arise. According to the argument, a receiver under section 37 who pays money in discharge of a mortgage binding on the estate can have no claim for contribution against a co-mortgagor notwithstanding that the latter is benefited by the payment. The insolvent too may have no claim as the right to contribution is a proprietary and not a personal right arising by virtue of the ownership of the property subject to the mortgage which indubitably is vested in the receiver by the order under section 37. There is thus no person who can enforce the right of contribution, and there is no way of making the co-mortgagor who defaulted in paying his share of the mortgage reimburse the other estate. We do not think this position is enjoined by anything contained in the Insolvency Act. The right of contribution is a right flowing out of the ownership of the hypotheca and goes with it. It resembles one of the illustrations mentioned at the bar, namely, that of trespass on property belonging to the debtor which is vested in the receiver under section 37. A claim for future mesne profits in respect of such property cannot be made by the debtor and can be enforced only by the receiver in whom the property itself vests. The non-payment of his share by the co-mortgagor may be regarded as an injury to the plaintiff's property which is to be compensated for by the payment of contribution.

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1. (1935) 69 M.L.J. 364 : I.L.R. 58 Mad. 908 (F.B.).
2. (1943) 1 M.L.J. 356.
3. (1943) 2 M.L.J. 134.
4. (1944) 1 M.L.J. 221.
5. (1942) 2 M.L.J. 714.

It is unnecessary for the purpose of this case to deal with the wider question whether property totally unconnected with any existing on the date of the order under section 37 will vest in an appointee under that section by force of section 28 (4).

As held by one of us in *Ramaswami Reddiar* v. *Kuppalagu Pandithan*[1], where certain properties are vested in a receiver under section 37, his powers in respect of such properties need not be expressly conferred by the order made under section 37 ; they may be such as are necessarily implied by the vesting order, and the receiver will have in respect of such properties the powers he had in respect of the insolvent's properties generally before the date of the annulment.

We must therefore overrule the contention on behalf of the first respondent that the plaintiff cannot sue under section 82.

Another contention was sought to be raised, namely, that certain persons had purchased or otherwise acquired interests in the suit properties even by the date of suit and that the suit for contribution was not sustainable as they were not all impleaded as defendants. No such objection was raised in the written statement, and we did not therefore permit it to be raised at this stage.

Finally it was said that the suit should be remitted to the Court below for finding out what amount is due to the plaintiff from the first defendant by way of contribution, regard being had to the values of the two sets of properties in 1931. The pleading of defendants 2 and 3—the first defendant having filed no written statement—is by no means clear. A reference is made in the written statement of defendants 2 and 3 to the inequality of the sales of the properties of the plaintiff and the first defendant, meaning evidently that it cannot be assumed that what were realised by the Court sales of the plaintiff's properties and of the first defendant's properties represent their correct values on the dates of those sales. This, however, is quite irrelevant, and it is this pleading that was responsible for the way in which issue (7) was worded, namely, "whether in fact the properties sold were equal or unequal in value ?" Notwithstanding that the issue was not happily worded, the learned Subordinate Judge referred to the plaintiff's averment that the properties which fell to the father's share and the properties which fell to the first defendant's share were equal in value. The learned Subordinate Judge accepted the correctness of the plaintiff's pleading in this respect. Some vague evidence was let in on both sides, but the outstanding fact is that in 1935 properties of equal value were allotted to the father and the son (the first defendant). There is nothing to show that the properties were not also of equal value in 1931 which is the material date according to section 82 of the Transfer of Property Act. There is also some evidence on the plaintiff's side that there was no appreciable difference in value between 1931 and 1935 and in fact till 1937. Even if there was any such variation, it would affect both shares equally, and it is therefore clear that the values of the properties must have been equal in 1931. The learned Subordinate Judge found that the plaintiff would be entitled to a decree as prayed, had it not been for the defect in his suit on the ground of non-joinder.

We have already indicated that the suit is not bad for non-joinder. The result is that the appeal must be allowed and the suit decreed as prayed for with costs of both Courts payable by the first defendant. There will be a direction as prayed against defendants 4 and 5. Defendants 4 and 5 will neither pay nor receive costs in either Court. The suit is withdrawn and dismissed against defendants 2 and 3 who will get their costs in both Courts as already stated. Time fixed for payment of the amount due to the plaintiff will be three months from now.

V.S. ——— *Appeal allowed.*

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1. (1944) 1 M.L.J. 221.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Potru Subbiah .. *Appellant**

v.

Palaparthi Venkteswarlu (minor) and others .. *Respondents.*

Hindu Law—Joint family—Same property alienated by different members to different persons—Rights of alienees—Right of alienee from alienee.

If one coparcener alienates an item of family property and then another coparcener alienates the same item of property the position of the alienee from the one is not stronger than the position of the alienee from the other. If there is any difference at all, equity favours the first alienee rather than the second who has purchased the property with a knowledge of the equitable rights of the first alienee. The second alienee would not acquire the rights of the second member of the family, because his alienor had no more right than the other alienor of alienating an item of joint family property. His right is the ordinary one of an alienee of an item of joint family property, namely, to sue for a general partition and ask that the item of property alienated to him to be allotted to the share of his alienor.

The relationship between an alienee from a member of a joint family and his alienee is that of a vendor and a purchaser under the Transfer of Property Act and the remedy of the alienee from the alienee is under their contract to recover damages for breach of covenant of title.

Appeals against the decrees of the Court of the Subordinate Judge of Bapatla, in A. S. Nos. 70 and 93 of 1945 respectively preferred against the decrees of the Court of the District Munsiff of Bapatla in O. S. No. 110 of 1944 and O. S. No. 291 of 1943.

V. Subramaniam and *N. Subramaniam* for Appellant.

K. Kameswara Rao for Respondents.

The Court delivered the following

JUDGMENT.—According to the findings of fact of the lower appellate Court, the father of a joint family consisting of himself and his minor sons sold the suit item of property to one Katta Subbayya, who subsequently became an insolvent. The rights of Katta Subbayya thereupon passed to the Official Receiver, who sold the land in auction to the present appellant. Later on, a collusive partition suit was instituted ; and as one would expect, the suit item fell to the share of the minor in partition. He thereupon through his guardian alienated the property in favour of the first respondent in A. S. No. 1137 of 1946 (hereafter termed the first respondent). The appellant filed O. S. No. 291 of 1943 for an injunction restraining the first respondent from interfering with his possession ; in the alternative, he asked for a general partition. The first respondent and the minor filed O. S. No. 110 of 1944 for possession. The Courts below found that the appellant had been in possession of the suit lands. The lower appellate Court also found —it will perhaps be better to say that it assumed—that the transfer in favour of the appellant was a valid one. Although the question of the genuineness of the transfer in favour of the first respondent was considered by the trial Court and found in the negative, the Subordinate Judge held that it was not necessary to go into that question. He however said,

"My finding on this point is that no question arises for decision in the present litigation with reference to the passing of consideration for Ex. D-13 (the sale in favour of the first respondent). I hold that it is a valid sale deed."

The Subordinate Judge held that since the appellant was entitled to the father's half share and the first respondent was entitled to the minor's half share, they were co-owners of the property and that therefore the appellant was not entitled to an injunction. He therefore dismissed his suit. In the suit of the first respondent the learned Subordinate Judge held that although he was not entitled to possession of the whole of the property, he had acquired the interests of the minor and was therefore entitled to a half share. He passed a preliminary decree as if the suit had been one for partition, which it was not.

* S. A. Nos. 1026 and 1137 of 1946. 13th February, 1948.

On the findings of fact, the appellant and the first respondent were clearly not co-owners. The father did not purport to convey his share of the property, but the whole of a particular item. That would not have entitled the vendee to a half share in that particular item. It would merely have given him an equitable right to sue for a general partition and to pray that, if possible, that particular item of property might be allotted to him in the partition, and if not, that he might be given some other property instead. The right of the first respondent was of a similar nature. It is incorrect to say that they were each entitled to an undivided half share in the property and that they were therefore co-owners. They were rival claimants to ownership rather than joint owners.

The learned advocate for the respondent has pointed out that whatever might have been the rights of the alienee from the father, who subsequently became an insolvent, the appellant has no such equitable rights. By his purchase in Court auction he did not purchase an equitable right but the land. In section 261 (3) of Mullah's Hindu Law, the learned author discusses the rights of an alienee from an alienee of an item of jont familv property and disagrees with the conclusions arrived at on this point in two decisions of this Court. Since they are Bench decisions, however, I am bound to follow them. In *Dadha Sahib* v. *Mohamed Sultan Sahib*[1], which deals with very much the same question as in *Sabapathi Pillai* v. *Thandavaraya Udayar*[2], the learned Judges said,

> " The plaintiff has not bought the land from a Hindu coparcener, who, according to Hindu Law, would have a right to demand partition of the family property and to get the share due to him. The plaintiff has bought certain specific land from the first defendant, who is a Muhammadan, and between them there can be no question of working out any such equity as is mentioned in *Nanjaya* v. *Shanmugha*[3]. When analysed, the position is simply this. *A* sells a particular parcel of land to *B*. It is found that *A* has no title to the land. Can it be said that *B* is entitled to ask *A* to convey to him some other land in place of what he bought? When stated in those words, the position of the plaintiff would be quite untenable and it is difficult to see why the character of the superior title by which the title of the vendor in the land which he purported to sell is defeated, should make any difference to the vendee's rights. As the vendor's title to the land in dispute has been superseded by a superior title, the only remedy open to the vendee is damages for breach of warranty of title "

It is argued that the particular kind of equity with which we are concerned now is not the equity to have another item of land out of the joint family property in the place of that conveyed, but the equitable right to have that particular item of property allotted to the alienor in partition. The two equities are not however separable. A vendee from a member of a family has a right in the first instance to ask that, if it be possible, the property purchased by him might be allotted to the share of his alienor in partition and failing that to have another item of family property allotted to him in its stead. The same line of reasoning would seem to apply to the cases immediately before me as in the cases under consideration in *Dadha Sahib* v. *Mohamed Sultan Sahib*[1] and *Sabapathi Pillai* v. *Thandavaraya Udayar*[2]. The decisions proceeded on the basis that the relationship between an alienee from a member of a joint family and his alienee was that of a vendor and purchaser under the Transfer of Property Act, and that the only remedy of the alienee from the alienee arises out of their contract, *i.e.*, a right to damages for breach of covenant of title.

The appellant's suit for injunction was therefore rightly dismissed, as was his prayer for general partition.

The first respondent bases an argument on the decision in *Iburamsa Rowther* v. *Thiruvenkatasami Naick*[4] and argues that the minor in the present case would have had a right to sue for a half share in the item alienated by his father and that the first respondent, being a purchaser from the minor, stepped into the shoes of the minor and acquired his right of demanding a half share in the suit property. In *Iburamsa Rowther* v. *Thiruvenkatasami Naick*[4], the learned Judges considered the

1. (1920) 39 M.L.J. 706 : I.L.R. 44 Mad. 167.
2. (1919) 37 M.L.J. 620 : I.L.R. 43 Mad. 309.
3. (1913) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
4. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.).

various authorities dealing with the right of one member of a family with regard to items of property alienated by another member of the family; and they held that a coparcener aggrieved by the alienation of joint family property by another coparcener is not bound to bring a suit for general partition and can bring a suit for his share in the specific items of property alienated by the other coparcener. The learned Judges then went on to consider the position of an alienee of the share of a coparcener other than the coparcener who had alienated the property; and they held that a person who purchased the rights of a coparcener to bring a suit for partition of the specific items alienated by the other coparcener acquired all his rights and can therefore sue for partition of the specific items of property and is no more bound to bring a suit for general partition than is the coparcener whose rights he has acquired. It is however very different when the conduct of the one coparcener is precisely the same as that of the other. If one coparcener alienates an item of family property and then another coparcener alienates the same item of property, the position of the alienee from the one is not stronger than the position of the alienee from the other. If there is any difference at all, the equity favours the first alienee rather than the second, who purchases the property with a knowledge of the equitable rights of the first alienee. The second alienee would not acquire the rights of the second member of the family; because his alienor had no more right than the other alienor of alienating an item of joint family property. Whatever may be the rights of the first respondent, therefore, it is not a right to possession of the property or even to a half of the property. His right is the ordinary one of an alienee of an item of joint family property, namely, to sue for a general partition and to ask that the item of property alienated to him be allotted to the share of his alienor. To that extent second appeal No. 1026 of 1946 succeeds.

The first respondent has filed a memorandum of cross-objections in S. A. No. 1026 of 1946 claiming the whole of the property on the ground that the appellant has no right in the land at all. Even if that were the case, it would not entitle the first respondent to possession of the whole or part of the property. S. A. No. 1026 of 1946 is allowed with costs, and the memorandum of cross-objections dismissed with costs. S. A. No. 1137 of 1946 is dismissed with costs, and the memorandum of cross-objections dismissed without costs.

The first respondent now asks for leave to amend his plaint. There is no petition before me containing such a prayer; and as a suit for partition is altogether different from the present suit for possession, alleging dispossession just before suit, no such amendment could be granted.

V.S. *S. A. No.* 1026 *of* 1946 *allowed.*

S. A. No. 1137 *of* 1945 *dismissed.*

Memorandum of cross-objections in both dismissed.

[END OF VOLUME, 1948—I.]

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